85-1356

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

SILAS J. ALEXANDER, ET AL,

Petitioners,

v.

CHICAGO PARK DISTRICT, ET AL.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: February, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. Section 144 requires disqualification of the trial judge on the ground of "a personal bias in favor of defendants" where the affidavits filed in support of plaintiffs' motion for disqualification establish that the trial judge participated pervasively and profoundly in the precise activities which, according to the affidavits, provide the basis for attacking defendants' credibility.

2. Whether a trial judge's "impartiality might reasonably be questioned" so as to require his recusal under 28 U.S.C. Section 455(a) where the affidavits filed in support of plaintiffs' motion for disqualification establish that the trial judge participated pervasively and profoundly in the precise activities which, according to the affidavits, provide the basis for attacking defendants' credibility.

PARTIES TO PROCEEDING[1]

The named plaintiffs in this class action include:

Silas J. Alexander, Karen Turner, Renee Bradford, Lillian Schrean, Joel Alexander, Earline Oglesby, Martha McGee, Althea Tucker, Rosemary Garrett, Latoski McCarthy Dillion, Beverly Gray, Anthony Gray, Arlene Gaston, Willie Gaston, Angel Gomez, Juan Gomez, Luis Diaz, Luis Flores, Comite Latino, Clara Evans, Christopher Delano Barnett, Oscar Wells, Terry Lee Fisher, Agnes Bernaugh, William Hall, Charles Adkins, Natalie Lyle.

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[1] "Plaintiffs" will be used throughout in lieu of "Petitioners"

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

SILAS J. ALEXANDER, ET AL,

Petitioners,

v.

CHICAGO PARK DISTRICT, ET AL.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

A writ of certiorari is respectfully sought to review the Court of Appeals' order affirming the trial court's denial of plaintiffs' motions for disqualification of the trial judge under 28 U.S.C. Section 144 and 455(a).

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 773 F.2d 850 (7th Cir. 1985). The order of the court of appeals denying defendants' petition for rehearing appears at App. 2. The opinion of the district court denying the motions for disqualification (App. 4) is not reported.

JURISDICTION

The judgment of the court of appeals (App. 1) was entered on September 19, 1985. A petition for rehearing was denied on November 13, 1985. This cross-petition for certiorari is filed in response to Case No. 85-1342.

STATUTES AND CIRCUIT RULE INVOLVED IN THE CASE

Two statutory provisions are involved in this case: 28 U.S.C. Sections 144 and 455(a).

28 U.S.C. Section 144 provides in pertinent part:

> Bias or prejudice of judge
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. Section 455(a) provides in pertinent part:

> Disqualification of Justice, Judge, or magistrate
>
> a. Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Circuit Rule 18, also at issue in the instant case, provides:

> CIRCUIT RULE 18. Reassignment of Remanded Cases
>
> Whenever a case tried in a district court is remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case. In appeals which are not subject to this rule by its terms, this court may nevertheless direct in its opinion or order that this rule shall apply on remand.

STATEMENT OF THE CASE

1. PLAINTIFFS' INITIAL COMPLAINTS

On June 27, 1979, SILAS J. ALEXANDER and thirty-seven other black, Hispanic, and poor residents of Chicago amended a previously filed action by filing a class action lawsuit charging the CHICAGO PARK DISTRICT (hereinafter DISTRICT) and its superintendent and commissioners with various acts of racial and ethnic discrimination in violation of the Equal Protection Clause and 42 U.S.C. Section 1983. Each commissioner was sued individually and in his or her official capacity. Damages were sought in addition to injunctive relief.

The DISTRICT, a unit of local government, was created by the Illinois Legislature in 1933. Comprised of five hundred seventy-four (574) parks, playgrounds, and playlots of various sizes, it is required to provide recreational services throughout the territorial limits of the City of Chicago. The DISTRICT employs approximately 3,400 persons, has jurisdiction over approximately 7,321 acres of land and operates some eighty (80) divi-

sions and departments. It is governed by a five-person Board of Commissioners, whose members are appointed by the Mayor of Chicago.

On July 30, 1979, the district court dismissed without prejudice Counts V and VI of the Amended Complaint (relating to certain disputed real estate), but denied defendants' motion to dismiss the remaining counts.

These counts charged the defendants, *inter-alia*:

(a) with discriminating against black, Hispanic, and poor residents of Chicago in the allocation of recreational resources, i.e., staff, programs, and capital improvements, (*the general park conditions count*);

(b) with administering a racially and ethnically discriminatory civil service exam for the position of "physical instructor" and discriminating on the basis of race and ethnicity in the terms and conditions of employment (*the employment discrimination counts*); and

(c) with purposefully failing to correct known hazardous conditions existing within parks located in predominantly minority and poor neighborhoods, with the end result that plaintiffs, and the class which they sought to represent, experienced substantially disproportionate numbers of personal injuries (*the mass tort count*).

2. CERTIFICATION OF CLASS

On April 7, 1980, a class certification order was entered. The class, as defined, consisted of all black and Hispanic residents of the City of Chicago as to the general park conditions count, and designated subclasses appropriate to the employment discrimination and mass tort counts.

3. THE MOTION FOR A PRELIMINARY INJUNCTION

On December 2, 1981, plaintiffs moved for a preliminary injunction to restrain defendants from committing further constitutional violations. The motion for preliminary injunction related to the *general park conditions* count only. On September 30, 1982, the court denied plaintiffs' motion for preliminary injunction.

4. MOTIONS FOR DISQUALIFICATION OF THE DISTRICT COURT JUDGE

On November 12, 1982, plaintiffs filed two separate motions seeking disqualification of the district court judge, pursuant to 28 U.S.C. Sections 144 and 455(a). (App. 3).

5. APPEAL FROM THE DENIAL OF THE MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR REVERSAL PREDICATED ON THE TRIAL JUDGE'S FAILURE TO RECUSE HIMSELF UNDER 28 U.S.C. 455(a).

On October 30, 1982, plaintiffs filed a notice of appeal from the denial of the motion for preliminary injunction. Plaintiffs were required to file their initial brief with the Seventh Circuit on December 22, 1982. Because the trial court had not ruled on the motions for disqualification during the five-week period from the date of filing until the due date of plaintiffs' brief, no appealable order existed with respect to the Section 144 motion. However, since the Seventh Circuit has held that a party may seek disqualification pursuant to Section 455(a) *at any time, SCA Services, Inc.* v. *Morgan,* 557 F.2d 110, 117 (7th Cir. 1977), plaintiffs argued as part of the interlocutory appeal that the trial judge had breached his affirmative

duty to recuse himself *sua sponte* under Section 455(a), and that the appellate court should so rule.

6. TRIAL COURT'S DENIAL OF MOTIONS FOR DISQUALIFICATIONS.

On January 7, 1983, the trial court denied both motions for disqualification, and supported its order with a memorandum opinion (App. 4).

7. PETITION FOR WRIT OF MANDAMUS TO DISQUALIFY TRIAL JUDGE.

On January 27, 1983, plaintiffs filed a Petition for a Writ of Mandamus with the Seventh Circuit seeking disqualification of the trial judge pursuant to 28 U.S.C. Section 144, and 455(a), *Alexander* v. *Honorable George N. Leighton*, No. 83-1161. On February 8, 1983, a three-judge panel of the Seventh Circuit denied the Petition for a Writ of Mandamus in an order unsupported by opinion. On February 23, 1983, plaintiffs filed a petition for an en banc rehearing of the denial of the mandamus writ, which was denied April 4, 1983, also by order unsupported by opinion.

8. TRIAL ON THE MERITS.

Shortly before the start of the trial the district judge consolidated the *Alexander* action with that of *Midwest Community Council* v. *Chicago Park District*, 98 F.R.D. 491 (N.D.Ill. 1983), a class action lawsuit filed two months after *Alexander*, which charged the DISTRICT with racial discrimination in the allocation of recreational resources in certain predominantly black wards in Chicago.[2]

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[2] The Justice Department filed still a third lawsuit charging the DISTRICT with racial discrimination in the allocation of recreational resources, *United States* v. *Chicago Park District*, 82 C 7308 (N.D.Ill.). A consent decree was entered in that case in the fall of 1983.

(*Alexander* had charged racial *and* ethnic discrimination *throughout* the City of Chicago, and had also alleged employment discrimination, and acts supporting a mass tort count.) The trial on the merits began May 23, 1983. Plaintiffs elected to try their case to a jury instead of having a bench trial.[3]

9. AFFIRMANCE OF DENIAL OF MOTION FOR PRELIMINARY INJUNCTION.

On June 3, 1983, the Seventh Circuit affirmed the trial court's denial of the motion for preliminary injunction, *Alexander, et al.* v. *Chicago Park District, et al.*, 709 F.2d 463 (7th Cir. 1983). The Seventh Circuit declined, however, to reach the issue of disqualification under Section 455(a) stating that an order rendered under 28 U.S.C. Section 455(a) is not an interlocutory order appealable as of right under 28 U.S.C. Section 1292(a), and noting that plaintiffs had already obtained review through the mandamus proceeding.

10. SEVERANCE OF THE ALEXANDER EMPLOYMENT DISCRIMINATION AND MASS TORT COUNTS DURING TRIAL.

On June 13, 1983, during the trial, the *Midwest* plaintiffs moved for reconsideration of the consolidation order, and requested that the trial of the *Alexander* employment and mass tort counts be severed from the trial of the *Alexander* general conditions count and the *Midwest* case. On June 14, 1983, the trial court granted Midwest's motion and directed that the employment and mass tort counts be tried at a later time.

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[3] Due both to the racial composition of the venire, and defendants' exercise of their peremptory challenges, no blacks were represented in the jury.

11. JURY VERDICT IN FAVOR OF DEFENDANTS.

On August 17, 1983, the jury returned its general verdict in favor of all defendants and against all plaintiffs. The court immediately entered judgment on the verdict.

12. DEFENDANTS' POST-TRIAL MOTION FOR SUMMARY JUDGMENT.

On September 13, 1983, defendants filed a "Motion for Summary Judgment" respecting the employment discrimination and mass tort counts. Defendants contended that, under the doctrine of *res judicata,* the adverse judgment on Count I required dismissal of the employment discrimination and mass tort counts. On September 23, 1983, the trial court denied defendants' motion as to the employment discrimination counts, but granted it as to the mass tort count.

13. PLAINTIFFS' FOURTH AMENDED COMPLAINT, MOTION TO DISMISS ORDER DISMISSING FOURTH AMENDED COMPLAINT.

On October 24, 1983, plaintiffs filed their Fourth Amended Complaint. Defendants subsequently moved to dismiss the complaint in its entirety. Ten months later on October 18, 1984, the trial court dismissed certain counts on the basis of *res judicata.* The court dismissed the remaining employment discrimination counts, which were predicated on violation of the Equal Protection Clause and 42 U.S.C. Section 1983, on the ground that Title VII of Civil Rights Act, as amended, 42 U.S.C. Section 2000(e), preempts plaintiffs' right to sue the DISTRICT for violation of their constitutional right to be free of race discrimination in employment.

14. PLAINTIFFS' APPEAL TO THE SEVENTH CIRCUIT, APPELLATE COURT'S RULING, DENIAL OF DEFENDANTS' MOTION FOR REHEARING.

On November 20, 1984, plaintiffs appealed the dismissal of the Fourth Amended Complaint to the Seventh Circuit. Plaintiffs cited numerous grounds for reversal, including the trial court's denial of their Section 144 and 455(a) disqualification motions.

On September 19, 1985, the Seventh Circuit affirmed that portion of the trial court's order which dismissed certain of the counts on the basis of *res judicata,* and the district court's denial of the disqualification motions. The Seventh Circuit reversed the district court's dismissal of the employment discrimination counts, holding that they were not preempted by Title VII and remanded them for trial. (App. 1).

On October 3, 1985, defendants filed a Petition for Rehearing respecting the employment discrimination counts. On November 13, 1985, the Seventh Circuit modified certain language in its earlier order but denied defendants' Petition for Rehearing.

This Petition for Certiorari is delimited to a review of the Seventh Circuit's affirmance of the trial court's denial of the motions for disqualification.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THOSE OF THE SIXTH CIRCUIT, AND SO FAR SANCTIONS THE TRIAL COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWERS OF SUPERVISION.

A. The trial judge's denial of plaintiffs' motions for disqualification pursuant to 28 U.S.C. Section 144 was improper.

1. The impetus for the motions.

After plaintiffs and defendants had rested in the trial of the preliminary injunction, the trial judge called as a court witness Defendant-DISTRICT Commissioner THEODORE JONES, stating:

> "Mr. Theodore Jones was President of the Chicago Branch of the N.A.A.C.P. . . . for many years, a business man in this community. He is a defendant in this case. The plaintiffs have alleged that he and the other defendants have acted together to deprive them of their civil rights. I want to hear from Mr. Jones, what he knows about this."

The court then went on to question JONES preliminarily as follows:

> Q. Mr. Jones, would you state for the record how long you and I have known each other.
> A. Oh, gosh, I would say, your Honor, that it is approximately 40 years.
> Q. How many?
> A. Forty.

Q. 40, that's right. Would you describe the nature of our acquaintanceship?
A. Well, it has been both professional and civic and social, all three, I would say.
Q. Now you were, were you not, President of the Chicago Branch of N.A.A.C.P. in the City of Chicago?
A. Yes, I was.
Q. And what years were those, do you remember?
A. I was President in 1957, '58 and '59.
Q. Am I not correct, Mr. Jones, that in addition to that presidency you have been active in the Chicago Branch, N.A.A.C.P. for many years?
A. I have served on its board of directors since 1957 and until now.

The court then proceeded to matters having to do with the substance of the litigation.

Thus, for the first time on September 3, 1982, plaintiffs were made aware that defendant JONES' credibility was, in the judge's view, substantially enhanced by his association with the Chicago Branch N.A.A.C.P. Since Mr. Jones' presidency of the Chicago Branch had occurred more than 23 years before the hearing, there had been no reason to assume that association would have any effect on the court regarding the credibility of the defendants. However, when plaintiffs received the court's October 1, 1982 opinion denying their motion for preliminary injunction, it was abundantly clear that the court found defendant JONES' credibility virtually unimpeachable as a result of his N.A.A.C.P. - related past.[4] Paragraph 7 of the court's conclusions of law state:

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[4] In his opinion denying the motions for disqualification, the trial judge waxes just short of rhapsodic in characterizing his own and defendant JONES' civil rights "contributions". "This judge, when he was a practicing attorney, and also active in the civic affairs of Chicago, became acquainted with Mr. Jones. In a general way, they

7. This court found it necessary to call as its witness, Mr. Theodore Jones, a member of the Negro race, a civic leader in the Negro community of Chicago, a former president of the Chicago Branch, National Association for the Advancement of Colored People. Mr. Jones was neither deposed nor interviewed by the plaintiffs prior to the hearing of the motion for preliminary injunction. *This court concludes in evaluating Mr. Jones' testimony that he would have disclosed as candidly as he testified, any basis that would support the plaintiffs in this case. He did not.* (Emphasis supplied).

After receipt of the court's opinion on October 1, 1982, plaintiffs' counsel immediately undertook to determine whether JONES' activities in the N.A.A.C.P. warranted the high level of credibility ascribed to him by Judge Leighton. That inquiry revealed the facts related in the four affidavits of FAITH RICH and three prominent black citizens, EARL B. DICKERSON, LAWRENCE KENNON and TIMUEL BLACK, which were submitted in support of the motions for disqualification. (App. 3). These affidavits clearly allege facts which seriously impugn the character and effect of defendant Jones' N.A.A.C.P.-related activities. But they do far more than that. They also allege that, during defendant JONES' presidency, he and his administration were represented legally by Judge Leighton, who participated pervasively and profoundly in the activities which, according to affiants, clearly establish the basis for attacking defendant JONES' credibility.

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[4] (Continued)

were co-workers in many civil rights activities, *all having as their purpose the eradication of racism in the life of the American Negro in the City of Chicago*". (Emphasis Supplied) (App. 4, at pp. 35a-58a).

For example, affiant KENNON testified that during the summer of 1958, the west side unit of the N.A.A.C.P. was involved with protests against the DISTRICT triggered by the beatings by whites of blacks who had sought to use Rainbow Beach, then a segregated beach under the DISTRICT'S jurisdiction. The DISTRICT was charged with maintaining racially segregated facilities and failing to provide protection to black persons seeking to use these facilities. According to affiant KENNON, during the two years of JONES' presidency, when Judge Leighton represented the N.A.A.C.P. and JONES, the organization abandoned support for the efforts being made to fight the discriminatory practices of the DISTRICT, and in addition, those of the City of Chicago and the Chicago School Board. Thus the affiants seriously impugn defendant JONES' and his administration's fidelity to the cause of the N.A.A.C.P., as well as the character and results of their activities in that regard. The affidavits further show that the trial judge shared with defendant JONES ties to the Democratic Organization which, according to the affidavits, JONES in fact served to the detriment of Chicago blacks.

It was because plaintiffs recognized that upon the trial on the merits, there would clearly be a substantial dispute over the matter of defendant JONES' credibility, with plaintiffs maintaining that, on the DISTRICT Board, as with the N.A.A.C.P. more than twenty years before, JONES' conduct egregiously disserved blacks because his ultimate loyalties were in both instances owed to a political organization which had as a guiding tenet the continued subjugation, and disenfranchisement of blacks. Accordingly, plaintiffs sought to disqualify the judge from rehearing the trial on the merits, which had yet to be scheduled.

2. The bias standard as enunciated by this Court.

In *Berger* v. *U.S.*, 255 U.S. 22 (1920), this Court held that the bias or prejudice against a judge must be based upon something other than a ruling in the case — that is, it must be "personal" or extra-judicial in nature. And the affidavits must set forth "the identifying facts of times, places, persons, occasions and circumstances with the particularity that would reasonably be expected in a bill of particulars". *United States* v. *Zagari*, 419 F. Supp. 494, 501 (N.D.Calif. 1976). However, in deciding whether the affidavits state facts and reasons for the belief that bias or prejudice exists, the judge is required to accept as true all of the allegations contained in the affidavits. *Berger*, 255 U.S. 36.

The degree of bias which will be held sufficient to disqualify a judge was addressed in *In Re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requisite of due process. Fairness requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end, no man is permitted to try cases where he has an interest in the outcome. *That interest can not be defined with precision. Circumstances and relationships must be considered. This court has said, however, that every procedure which would offer a possible temptation to the average man as judge not to hold the balance, nice, clear and true between state and accused, denies the latter due process of law.* (cite). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform this high function in the best way, "justice must satisfy the appearance of justice" (cite). (Emphasis supplied).

Even the most cursory review of plaintiffs' affidavits establishes the painstaking particularity with which the facts establishing extra-judicial bias are attested.

3. The extra-judicial nature of the trial judge's attitudes and conceptions.

The bias alleged in the instant case is indisputably extra-judicial in nature. Although plaintiffs *discovered* Judge Leighton's bias through his remarks in court regarding the weight which he attached to defendant JONES' credibility, the affidavits show that the bias in favor of the defendants was "an attitude of extra-judicial origin", *Zagari*, 419 F.Supp. at 501. The trial judge stated that in his opinion Jones "would have disclosed, as candidly as he testified, any basis that would support the plaintiffs in this case". His faith in the credibility of defendant JONES' testimony and in the non self-serving nature of that testimony *must* stem from extra-judicial sources, as reasonable persons automatically assume that *during his testimony a party-defendant* will be an advocate for his own self-interest. Yet the trial judge, even before he heard defendant JONES' testimony, assumed the opposite. A reasonable person would wonder why the court had such unswerving faith in defendant JONES' testimony. Plaintiff Bradford's affidavits supply the answer. They chonicle the past extra-judicial association of the party-defendant and the trial judge, and establish that rather than being a "freedom fighter" in the cause of black rights, defendant JONES had cooperated with the trial judge, then his attorney, to subjugate those rights in the name of party politics.

The court in *U.S.* v. *Conforte*, 457 F.Supp. 641, 658 (D.C. Nev. 1978) aff. 624 F.2d 869 cert. den. 449 U.S. 1012 (1980) incisively explains the clear distinction between the "origin" of bias and its "place of expression".

> The purpose of the extra-judicial source requirement concerns the origin of the judge's bias rather than the place of its expression. Certainly, judicial rulings or comments on the evidence made during the course of a proceeding do not fall within the rule. However, if a judge's statements or conduct during a trial refer to or reflect a bias or prejudice which arose outside of his judicial duties, then the extra-judicial source rule is justified and reversal may be required.

As in *Conforte*, the origin of the trial judge's bias, although expressed in court, was extra-judicial.

4. The trial judge's credibility enmeshed with that of defendant JONES.

One key factor distinguishes this case from myriad others where disqualification has been sought but deemed inappropriate. Plaintiffs here *do not* seek to disqualify the trial judge because he was the friend of defendant JONES, nor because the trial judge was legal counsel to defendant JONES and the Chicago Branch N.A.A.C.P. during his presidency. Rather, plaintiffs contend that disqualification is mandatory because the trial judge *participated* pervasively in the activities which constitute the basis for attacking the credibility of defendant JONES. An attack on defendant JONES' credibility would necessarily and unavoidably require an attack on policies and actions which not only defendant JONES, but the trial judge himself personally participated in formulating and executing. An attack in these circumstances on defendant JONES' credibility would be an attack on the court's credibility. To expect impartiality in such circumstances would be sheer folly.

5. Other Section 144 requirements: Affidavits of party, Certificate of Counsel, timeliness.

As required by Section 144, RENEE' BRADFORD, a named plaintiff, filed her motion in support of the affidavit to disqualify the trial judge.[5] As required, her affidavit was the *first* and *only* affidavit submitted on behalf of plaintiffs, and it was based on information and belief. *Berger* v. *United States*, 255 U.S. at 35.[6] The requisite Certificate of Counsel accompanied the motions.

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[5]. In his opinion denying the motions, the trial judge attempts to impart significance to the fact that plaintiff Bradford's "affidavits do not contain any argument which would show that she personally knows this judge, or that he knows her." That such is the case is irrelevant, however, since plaintiff Bradford alleges "a personal bias or prejudice in favor of the defendants." Moreover, no direct relationship between the judge and a party or case is required in order to establish bias on the part of the judge. *Bell* v. *Chandler*, 569 F.2d 556 (10th Cir. 1978).

[6]. The trial judge, citing *Hall* v. *Burkett*, 391 F.Supp. 237, 242 (W.D. Okla. 1975) also states that plaintiff Bradford's incorporation by reference of the KENNON etc. affidavits into her own is improper. The trial court's use of that authority is inapposite. After the court there ruled that the motion was untimely *and* defective because not predicated on an extra-judicial source, it then noted, without citation to any authority, that "the doctrine of incorporation by reference has no application in a Section 144 affidavit". The court was prompted to make this statement because the moving party, the United States Attorney for Kansas, had attempted to establish bias by relying on the ". . . . actions, rulings, and orders . . . in the named proceeding . . . . as more fully appears from the files and transcripts . . . which are by this reference made a part of this affidavit." By contrast plaintiffs' affidavits plead extra-judicial facts with great specificity, not generalized references to "the court files and records." That *Hall* is a less than illustrious authority on which to rely is further evidenced by the fact that after denying the motion to

The first paragraph of Section 144 requires that a party file a "timely" affidavit. The second paragraph thereof provides that the affidavit "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time". However, terms of the district courts were abolished in 1963, 28 U.S.C. Section 138, and pursuant to local court rule, the United States District Court for the Northern District of Illinois meets in continuous session (Rule 1.10 of the United States District Court - Northern District.) Accordingly, there is no specific "timely" period which the court can refer to under the terms of the statute.

Although for the reasons outlined above the statute gives no guidance on what will be a "timely" filing, the case law is well settled that one must raise the issue of disqualification of a judge at the earliest possible moment after knowledge of the facts demonstrating the basis for disqualification become known. *United States* v. *Patrick,* 542 F.2d 381, 390 (7th Cir. 1976) cert. den. 430 U.S. 931 (1977). Plaintiffs have fully complied with this requirement. In the instant case, defendant JONES first testified as the court's witness on September 3, 1982. The court's order and Memorandum Opinion were filed on September 30, 1982. The instant motion for disqualification was filed

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[6] (Continued)

disqualify, the trial court then entered an order disbarring the United States Attorney and six of his assistants. Not surprisingly, this order was reversed on appeal. *Burkett* v. *Chandler,* 505 F.2d 217 (10th Cir. 1974), cert den. 423 U.S. 876 (1975). Too, no other court has ever followed the unsupported reference in *Hall* relied on by the trial court.

immediately after the court called JONES as a witness, after plaintiffs learned the significance and the high degree of credibility which the court ascribed to his testimony, after investigation revealed to plaintiffs the facts attested to by affiants, and after the transcript of the relevant court proceedings became available.

It is important to note, too, that plaintiffs sought the court's disqualification from hearing the *prospective trial on the merits,* which had yet to be set for trial and was to be held at some unknown future date. Since there could be no reasonable suggestion that the motion was made for purposes of delay, and since plaintiff BRADFORD had filed her motion at "the earliest possible moment after knowledge of the facts demonstrating grounds for disqualification became known", plaintiffs' motion was clearly timely.

B. Plaintiffs' Section 455(a) motion is legally sufficient.

1. Time requirements under Section 455(a).

Even if the Section 144 motion was considered untimely, the Section 455(a) motion for disqualification was not time-barred. In his memorandum opinion, the trial Judge stated that "[i]t is now settled that [the Section 144] time requirement applies with equal force to a motion under 28 U.S.C. Section 455(a)." However, the authority cited for that proposition, *In Re: International Business Machines Corp.,* 618 F.2d 923, 932 (2nd Cir. 1980), not only is in derogation of Seventh Circuit precedent, but also is based upon dictum. By contrast, in holding that there is no Section 455 timeliness requirement, the Seventh Circuit cited the legislative history of the statute to support its ruling:

> . . . . . Congress did not incorporate (a time limitation) in the statute. *SCA Services, Inc.* v. *Morgan,* 557 F.2d 110, 117 (7th Cir. 1977) (citations omitted).

2. The appearance of partiality.

The standard for asserting disqualification based on Section 455(a) is not whether a judge feels he is able fairly to hear a case, but whether a reasonable person who knows all the relevant facts would think the judge impartial. And in close cases, the judge must recuse himself. *Roberts* v. *Bailar*, 625 F.2d 125, 129 (6th Cir. 1980). The facts in *Bailar* closely parallel those of the instant case. There the district judge expressed his opinion that defendant, who was at least partly responsible for the challenged employment decisions, was an honorable man who "would never intentionally discriminate against anybody." *Id.* at 127. The district judge's pre-trial statement in *Bailar* echoes the trial judge's statements about JONES before and after his testimony at the preliminary injunction hearing. The trial judge attempts to distinguish his conduct from that of the judge in *Bailar*, stating that he did not prejudge the testimony of defendant Jones since "it was only in the course of these judicial proceedings that this judge had the opportunity to learn what Mr. Jones knew about the principal defendant in this case, the DISTRICT." (Ap. 4, p. 39a) The affidavits of course dispute this contention. Moreover, although the judge did note when questioning JONES that he and JONES had a friendship of forty years' duration, *he failed to note that he had represented Jones and the N.A.A.C.P. during Jones' presidency, when his clients were charged with complicity in the perpetuation of the DISTRICT'S alleged racial discrimination.* (See KENNON and BLACK affidavits). Under even the most conservative application of the standards of Section

455(a), the judge should have granted plaintiffs' motion for disqualification.

C. The Seventh Circuit's affirmance of the trial court's denial of the disqualification motions was improper.

The Seventh Circuit ruled (1) that the Section 144 motion was not predicated on an extra-judicial source; (2) that unlike the judge in *Roberts* v. *Bailar,* "the judge specified in denying the recusal motions that he had not prejudged Jones' testimony"; and (3) that the Section 455(a) motion required denial since the judge's impartiality might not be reasonably questioned since the association between the judge and defendant was "ancient history".

As noted in the preceding section, the mere fact that a bias is expressed in court does not preclude the bias from having an extra judicial origin. Moreover, the court's assertion that the trial judge had not prejudged the defendant completely ignores the basis of the disqualification motions: that in order to attack the credibility of defendants, the credibility of the trial judge would also have to be attacked. Ruling against disqualification because *"the judge said he was not biased"* eviscerates the guarantee of a tribunal of the type prescribed by *In Re Murchison.* The court's "ancient history" assessment requires rejection both because it is frighteningly facile, and as noted in *Berger*: *"to commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed."* 255 U.S. 36. The instant case is clearly one which would (and did) offer a possible temptation to the average man as judge ". . . not to hold the balance, nice, clear and true." In summary, the Seventh Circuit's ruling requires reversal because it repudiates the rulings of this Court, and the measured holding of *Bailar,* and in so doing makes a mockery of plaintiffs' right to a fair tribunal.

D. Having reversed in part the trial court's order, Circuit Rule 18 requires remand to a different judge.

Under Circuit Rule 18, on remand a different judge should have been assigned to the *Alexander* case. This result is required both because of the Rule and because neither a district judge nor the parties should have a vested interest in having a particular judge hear a particular action. *See Berger*, 255 U.S. at 35.

II.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this petition for a writ of certiorari be granted.

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Dated: February, 1986

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APPENDIX 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2995

SILAS J. ALEXANDER, et al.,

Plaintiffs-Appellants,

v.

CHICAGO PARK DISTRICT, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 79 C 2242—GEORGE N. LEIGHTON, *Judge*

ARGUED JUNE 4, 1985—DECIDED SEPTEMBER 19, 1985

Before CUMMINGS, *Chief Judge*, ESCHBACH, *Circuit Judge*, and WRIGHT, *Senior Circuit Judge.**

WRIGHT, *Senior Circuit Judge*. This lengthy litigation alleging discrimination in resources allocation and employment by the Chicago Park District during the years 1970 through 1980 raises these issues:

1) Did the court err in dismissing three counts of the amended complaint under res judicata and collateral estoppel?

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* The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

2) Did it err in dismissing the remaining three counts of the amended complaint for failure to state a cause of action under 42 U.S.C. § 1983?

3) Did it err in denying plaintiffs' recusal motions?

FACTS

The procedural sequence in this case is convoluted and will be simplified here to include only pertinent facts.

In 1979, Alexander filed a class action on behalf of all Black, Hispanic and poor Chicago residents alleging racial discrimination by the Chicago Park District and its attorneys, superintendent and past and present commissioners (collectively District). Personal liability is sought against the individual defendants.

In 1982, we affirmed the court's denial of plaintiffs' motion for a preliminary injunction to restrain the budgetary and fund allocation actions of the District. *Alexander* v. *Chicago Park District*, 709 F.2d 463 (7th Cir. 1983). Plaintiffs then filed two unsuccessful motions to disqualify Judge Leighton and followed these with a mandamus petition which we denied on February 8, 1983. Alexander's petition for an en banc rehearing on this mandamus petition was denied on April 4, 1983.

In 1983, the district court denied plaintiffs' motion for class notification under FED. R. CIV. P. 23(c)(2). It determined that class members would not be prejudiced because if the defendants prevailed, the class members without notice would not be bound.

Later in 1983, the district court consolidated this case with another class action, *Midwest Community Council, Inc.* v. *Chicago Park District* (*Midwest*), No. 79 C 3187 (N.D. Ill. Sept. 16, 1983) (unpublished), which raised similar discriminatory recreational resources allocation claims against the District. The *Midwest* action sought only equitable relief.

In count I of the second amended complaint, plaintiffs alleged that defendants administered the Chicago Park District in a racially discriminatory manner, so that parks located in predominantly Black communities were allocated less park resources, including state and federal funds, resulting in injuries and disparities in equipment and services. This count was brought under 42 U.S.C. § 1983.

Relying on the Due Process and Equal Protection clauses of the United States and Illinois Constitutions and on § 1983, plaintiffs brought employment discrimination claims in counts II and III. Count II charged that a civil service examination administered by the Park Service was not (1) job-related, (2) culturally, racially and sexually unbiased, and (3) objectively administered.

Count III dealt with hiring, assigning and promoting employees based on race and ethnicity. This count also alleged a variance in numbers of administrative, recreational, support and maintenance staff between parks in white and non-white communities. This in turn was alleged to have forced certain plaintiffs to resign from park employ because of limited job opportunities.

Count IV, brought under § 1983, alleges personal injuries to several plaintiffs resulting from these racially discriminatory practices. A fifth count was subsequently deleted.

The consolidated cases were tried in 1983. The court severed Alexander's employment discrimination and tort claims. During trial, Alexander filed a third amended complaint, similar to the second in the relevant allegations.

After a three-month trial, the jury returned a verdict for the defendants on the resources allocation claims and judgment was entered against plaintiffs on count I in the *Alexander* suit. Because the jury heard the *Midwest* claims in an advisory capacity only, the court subsequently en-

tered judgment for the District, incorporating its own findings of fact and conclusions of law. No appeal was taken from the *Midwest* judgment.

Defendants moved for summary judgment contending that the jury verdict on count I was res judicata on all claims in counts II, III and IV. In an order dated September 23, 1983, the court granted summary judgment on count IV, reasoning that the underlying basis of the tort claim was discriminatory resources allocation causing dangerous conditions in black neighborhood parks. The court granted a partial summary judgment on counts II and III to the extent that discrimination in resource allocation or administration would not be relitigated. It then dismissed counts II and III under FED. R. CIV. P. 54(b) to allow the parties to appeal.

Alexander did not appeal but filed an amended complaint as authorized in the September 23 order. Count I alleged that the District expended federal funds in a racially and ethnically discriminatory manner in violation of regulations of the Department of Housing and Urban Development and Department of Interior under 42 U.S.C. § 1983.

Count II sought an injunction, reinstatement, back pay and damages under Due Process and Equal Protection Clauses of the United States and Illinois Constitutions and under 42 U.S.C. § 1983. It challenged the civil service examination given by the District on November 1, 1977 for a physical instructor position.

Count III incorporated the allegations of count I that defendants allocated resources to the parks in a discriminatory manner and the allegations of count II concerning the civil service examination. It also was brought under 42 U.S.C.§ 1983.

Count IV alleged that the District had a policy of allocating resources and employees on a discriminatory basis in violation of the Due Process and Equal Protection

Clauses of the United States and Illinois Constitutions and 42 U.S.C. § 1983. It sought monetary relief for hiring, assignment and payment of personnel on a racially discriminatory basis.

Count V alleged that the District expended federal funds in a discriminatory manner and contrary to federal regulations, resulting in class members being forced to resign from the District's employ. Count VI alleged that the policy of expending federal funds in a discriminatory manner resulted in reduced maintenance, aid and inspections at minority parks, resulting in physical injuries to minority members.

The District moved to dismiss on the grounds of res judicata and that the complaint failed to state a claim under 42 U.S.C. § 1983. The court granted the motion on October 18, 1984, dismissing counts I, V and VI on res judicata grounds and counts II, III and IV for failure to state a claim.

ANALYSIS

Res Judicata

Res judicata is a doctrine of repose. "Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals." *Nevada* v. *United States*, 463 U.S. 110, 129 (1983), quoting *Southern Pacific Railroad* v. *United States*, 168 U.S. 1, 49 (1897). *See also Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 469 (7th Cir. 1982) (purpose is to reduce costs of litigation).

Under res judicata, or claim preclusion,[1] a prior judgment on the merits bars the same parties or their privies

[1] Preclusion occurs under two theories: issue preclusion and claim preclusion. Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit on the merits between the same parties or

from relitigating all issues which were raised and decided or could have been raised in the prior action. *Harper Plastics, Inc.* v. *Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981); *Lee* v. *City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). The doctrine applies in civil rights suits as well. *Lee*, 685 F.2d at 198-99; *Local 1006, A.F.S.C.M.E., AFL-CIO* v. *Wurf*, 558 F. Supp. 230, 233 (N.D. Ill. 1982). *See also Migra* v. *Warren City School Dist. Bd. of Education*, 465 U.S. 75, ..., 104 S. Ct. 892, 899 (1984) (state preclusion law applies in federal § 1983 suit brought subsequent to state suit).

In determining the preclusive effect on the six counts in the fourth amended complaint of the jury's verdict on count I and the summary judgment on count IV of the third amended complaint, the court analyzed the three threshold requirements of res judicata: (1) identity of parties; (2) identity of causes of action; and (3) a final judgment on the merits. *Lee*, 685 F.2d at 199. *See Nevada* v. *United States*, 463 U.S. 110, 129-30 (1983); *Local 1006*, 558 F. Supp. at 234.

1. Identity of Parties

The court found that named plaintiffs in the fourth amended complaint were named also in the third amended

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[1] **(Continued)**

their privies. Plaintiffs' claims are merged in the judgment for plaintiff while judgment for defendant acts to bar any further claims by plaintiff against that defendant. It is usually referred to as res judicata, and that is how we use it. *See Migra* v. *Warren City School Dist. Bd. of Education*, 465 U.S. 75,—— 104 S. Ct. 892, 894 n.1 (1984).

Issue preclusion prevents relitigation of a matter of fact or law that was previously litigated and decided. *See Jones* v. *City of Alton*, 757 F.2d 878, 879 n.1 (7th Cir. 1985). It is usually referred to as collateral estoppel.

The trial court dealt with both issue and claim preclusion. Because of our decision on claim preclusion, we need not reach the collateral estoppel issue.

complaint and so concerned itself only with the last two requirements. Twenty-seven plaintiffs were named in the third amended complaint. They were named in the fourth amended complaint, with the addition of the Commite Latino. No allegations were made as to the membership of the Commite and no motion for intervention was made. *See* 3B J. Moore, J. Kennedy, *Moore's Federal Practice* ¶ 23.90[2] (2d ed. 1985). The court ignored it as not properly a party to this class action and we agree.

On appeal the plaintiffs argue that res judicata was inappropriate because the court refused to require notice to the class. This does not affect application of res judicata against the named plaintiffs. Any preclusive effect against potential class members not notified of the suit is not an issue before us. *See Teamster Local 282 Pension Trust Fund* v. *Angelos*, No. 84-2141, slip op. at 4 (7th Cir. May 13, 1985) (second court decides for itself preclusive effect of first litigation).

2. Identity of Causes of Action

The trial court held that counts I of the third and fourth amended complaints were identical. It found that counts V and VI were premised on the same facts, which is sufficient identity for res judicata purposes.

A cause of action consists of "a single core of operative facts" which give rise to a remedy. *Mandarino* v. *Pollard*, 718 F.2d 845, 849 (7th Cir. 1983) (operative facts were employment termination and surrounding circumstances), *cert. denied*, ... U.S. ....., 105 S. Ct. 116 (1984); *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230, 1234-35 (7th Cir. 1982) (essential fact underlying first and second suit was seniority), *cert. denied*, 460 U.S. 1070 (1983); *Lee*, 685 F.2d at 200 (cause of action consists of single core of operative facts).

Plaintiffs assert that they complain of violations of federal regulations in counts V and VI, charges not made in previous complaints. This argument is to no avail. The

essential fact in count I of the third amended complaint was discriminatory fund disbursement. It is the essential fact underlying counts V and VI of the fourth amended complaint.

A mere change in the legal theory does not create a new cause of action. *Shadid* v. *Oklahoma City*, 494 F.2d 1267, 1268 (10th Cir. 1974). *See also Harper Plastics*, 657 F.2d at 945 ("An unsuccessful party may not . . . frustrate . . . res judicata by cloaking the same cause of action in the language of a theory untried in the previous litigation."). Extensixe evidence regarding compliance with the regulations was presented at trial.

Plaintiffs argue also that the general jury verdict is insufficient to determine precisely what was found on each issue. This confuses res judicata and collateral estoppel.

They assert that they were precluded from presenting evidence on injuries and deaths at the parks. The injury evidence went only to the issue of damages, not liability.

Both of the preceding arguments can be characterized as a challenge to the opportunity to fully and fairly litigate these claims. *See Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982); *Lee*, 685 F.2d at 201. This argument cannot be sustained in view of the three-month jury trial. Plaintiffs had a full and fair opportunity to litigate the issue of fund allocations. *See Jones*, 757 F.2d at 884; *Ohio-Sealy Mattress Mfg. Co.* v. *Kaplan*, 745 F.2d 441, 451-52 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2656 (1985).

3. Finality

The plaintiffs challenged finality on the grounds that the September 23 order was insufficient for rule 54(b) purposes. The district judge did not agree but found that, even if the order was not appealable, it had the requisite finality for res judicata purposes.

Rule 54(b) requires that if a court enters final judgment on fewer than all the claims it must make a deter-

mination that there is no just reason for delay and expressly order the entry of judgment. FED. R. CIV. P. 54(b). The September 23 order did not technically comply with Rule 54(b), but it was clear:

> In order to enable the parties to this cause to appeal or cross-appeal, and in conformance with Rule 54(b), Fed. R. Civ. P., counts II and III of the Third Amended Complaint are dismissed, subject to the right of plaintiffs to file a Fourth Amended Complaint . . . .

The plaintiffs argue that remarks made by the court at a post-judgment conference indicate that the judgment was not to be considered final. The remarks came upon entry of the order. Because it is clear, and because the parties were explicitly told that the court wanted guidance from an appellate decision, we are convinced that the parties knew of their right to appeal.

The court did say it would certify under 28 U.S.C. § 1292(b) the res judicata effect of the count I verdict on counts II, III and IV. Even though no 28 U.S.C. § 1292(b) certification was entered, this did not make less clear the September 23 order.

Finally, while not expressly determining there was no just reason for delay in the order itself, the judge did determine that an appeal would be in the interest of the public, the court and the plaintiffs. This litigation had been before Judge Leighton for four and one-half years.

Although reluctant to deviate from the strict Rule 54(b) requirements, we have held that less than technical compliance will suffice when neither party is prejudiced by the lack of formality. *Local P-171, Amalgamated Meat Cutters & Butchers* v. *Thompson Farms Co.*, 642 F.2d 1065, 1072-73 (7th Cir. 1981); *accord Equal Employment Opportunity Comm'n* v. *Delta Air Lines, Inc.*, 578 F.2d 115, 116 (5th Cir. 1978). Plaintiffs' prejudice, if any, stems

from their choice not to appeal the September 23 order and not from lack of sufficient notice that the order was appealable.

Plaintiffs also challenge the dismissal of count IV of their third amended complaint on res judicata grounds. This issue was appealable as of September 23, 1983. We note that the district court correctly determined this issue.

The district court was also correct that the September 23 order was sufficiently final for res judicata purposes even if not appealable. *Lummas Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962), held that judgments not final for § 1291 can be " 'final' in the sense of precluding further litigation [depending on] such factors as the nature of the decision, . . . the adequacy of the hearing and the opportunity for review." *Accord O'Reilly* v. *Malon*, 747 F.2d 820, 822-23 (1st Cir. 1984); *Commodity Futures Trading Comm'n* v. *Board of Trade of City of Chicago*, 701 F.2d 653, 657 (7th Cir. 1983); *Chemetron Corp.* v. *Business Funds, Inc.*, 682 F.2d 1149, 1191 (5th Cir. 1982), *rev'd on other grounds*, 460U.S. 1007 (1983).

There is no doubt that two of the three *Lummas Co.* factors have been met here. The jury rendered a verdict only after a protracted trial. *See also Aiello* v. *City of Wilmington*, 470 F. Supp. 414, 419 (D.Del. 1979), *aff'd*, 623 F.2d 845 (3d Cir. 1980) (jury verdict final "in the sense of inalterable" from the date entered).

Title VII and § 1983

The district court dismissed the remaining counts of the Alexander plaintiffs' complaint on the grounds that Title VII is the exclusive remedy for employment discrimination charges. Under the principle established in *Trigg* v. *Fort Wayne Community Schools*, No. 84-1942 (7th Cir. June 25, 1985), we reverse.

Title VII is not the sole remedy for employment discrimination claims of state employees. *Id.*, slip op. at 5-6.

Congress intended to retain preexisting remedies. Only if the right asserted was created by Title VII must it be vindicated through the procedural system set up in that Act. *Accord Day* v. *Wayne County Bd. of Auditors,* 749 F.2d 1199, 1204 (6th Cir. 1984). *See also Carpenter* v. *Stephen F. Austin State University,* 706 F.2d 608, 612 n.1 (5th Cir. 1983) (Title VII is remedy unless specific allegations of constitutional violations); *Rivera* v. *City of Wichita Falls,* 665 F.2d 531, n.4 (5th Cir. 1982) (when § 1983 used as alternate remedy to Title VII, elements of cause of action are the same); *Whiting* v. *Jackson State University,* 616 F.2d 116, 121 (5th Cir. 1980) (same).

We sympathize with defendants' position and note that our holding and that of the Sixth Circuit create the anomolous situation that a federal employee is limited by the administrative procedures of Title VII while state employees are not. Because we interpret what remedies Congress has provided, we rule as we do. Congress may amend Title VII if it so chooses.

Counts II and IV are based on the Fourteenth Amendment's protection against intentional discrimination based on class membership. *Trigg,* slip op. at 2; *Huebschen* v. *Department of Health and Social Services,* 716 F.2d 1167, 1171 (7th Cir. 1983). They survive at this stage of the proceedings.

Count III is more problematic. Plaintiffs concede it is based on statutory violations. *See Maine* v. *Thiboutot,* 448 U.S. 1, 4 (1980). To the extent that it also alleges discriminatory fund disbursement, the district court has correctly ruled that the issue is already decided and may not be relitigated. That court will carefully limit the evidence to assure that defendant will not again be subjected to defending those allegations.

Recusal

On November 12, 1982, plaintiffs filed disqualification motions against Judge Leighton under 28 U.S.C. §§ 144 and 455(a). The motions were based on statements by the

court during the hearing on plaintiffs' motion for a preliminary injunction and findings and conclusions entered in ruling on that motion.

Again we rule against plaintiffs on this issue. Under section 144, bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966); *United States* v. *English*, 501 F.2d 1254, 1263 (7th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975). The plaintiffs' affidavits set forth only rumor concerning the administration of the Chicago NAACP 25 years ago.

Plaintiffs' insinuations that the trial judge did not vigorously pursue alleged discrimination when he represented the NAACP are not an extrajudicial source of bias. What must stem from an extrajudicial source are facts and information.

Judge Leighton called as a witness Mr. Jones, a former President of the Chicago NAACP whom he had represented 25 years earlier. He indicated surprise that the plaintiffs had not called Jones or deposed him.

Contrary to plaintiffs' assertions, Jones' credibility was not automatically enhanced. The judge specified in denying the recusal motion that he had not prejudged Jones' testimony. *Cf. Roberts* v. *Bailar*, 625 F.2d 125, 127-29 (6th Cir. 1980).

Section 455(a) requires recusal if the judge's impartiality might reasonably be questioned. 28 U.S.C § 455(a); *Pepsico, Inc.* v. *McMillen*, No. 85-1932, slip op. at 3-4 (7th Cir. June 6, 1985). The association between Judge Leighton and Mr. Jones in 1958 was ancient history and insufficient to support a recusal motion.

CONCLUSION

We affirm the dismissal of counts I, V, and VI on res judicata grounds. We remand counts II, III and IV to the district court to rule first on the several other grounds raised in the District's summary judgment motion.

Judge Leighton has dealt with this complicated case in an admirable fashion. We affirm his dismissal of plaintiffs' recusal motions.

This case has been in the court system since June 27, 1979. In the interests of bringing it to an end and decreasing the costs to the parties and the courts, we retain jurisdiction during this remand. After final orders are entered below, this case will be resubmitted to this court and panel without oral argument. Leave will be granted to file briefs within three weeks after the record is certified to us. *See Grano* v. *Department of Development of City of Columbus*, 637 F.2d 1073, 1082 (6th Cir. 1980).

AFFIRMED IN PART AND REVERSED IN PART.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 13, 1985

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. EUGENE A. WRIGHT, *Senior Circuit Judge**

No. 84-2995

SILAS J. ALEXANDER, et al.,

Plaintiffs-Appellants,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 2242
GEORGE N. LEIGHTON, *Judge*.

ORDER

On consideration of the petition for rehearing of defendants-appellees and the response thereto of plaintiffs-appellants, our slip opinion of September 19, 1985, is hereby corrected in the following two respects:

On page 11 of the slip opinion, the paragraph beginning "Count III is more problematic * * *" is replaced with the following four paragraphs:

> "Count III is more problematic. Plaintiffs concede that it is based on statutory violations. Generally,

* The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

where a statute provides its own comprehensive enforcement scheme, that scheme may not be bypassed by pleading an underlying violation of the statute and bringing suit directly under § 1983. *Middlesex County Sewerage Authority* v. *National* Sea Clammers Association, 453 U.S. 1, 20 (1981) (Federal Water Pollution Control Act, Marine Protection, Research and Sanctuaries Act); *Smith* v. *Robinson*, 104 S.Ct. 3457, 3468 (1984) (Education of the Handicapped Act); *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973) (habeas corpus).

"Title VII is one of the statutes that may not be by-passed. *Grand American Federal Savings* v. *Novotny*, 442 U.S. 366, 375-378 (1979) (Title VII may not be bypassed via § 1985(3)). Is Title VI like Title VII in this respect?

"We think it is. Title VI provides its own administrative enforcement procedure which would be bypassed by pleading Title VI violations under § 1983. Moreover, the remedies available under Title VI should in some cases be limited to declaratory and injunctive relief. *Guardians Association* v. Civil Service Commission, 463 U.S. 582, 597-598 (1983). This limitation would be lost in the broad grant of a remedy at law or equity available under § 1983.

"Since Title VI provides its own remedial scheme, we hold that private actions based on Title VI may not be brought under § 1983. See *Guardians Association*, 463 U.S. at 610 n.3 (Powell, J., concurring)."

On page 12 of the slip opinion, the paragraph beginning "We affirm the dismissal * * *" is replaced with the following paragraph:

"We affirm the dismissal of counts I, V and VI on res judicata grounds. We affirm the dismissal of count III for failure to state a claim. We remand counts II and IV to the district court to rule first on the several other grounds raised in the District's summary judgment motion."

The petition for rehearing is hereby denied.

APPENDIX 3A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

MOTION FOR DISQUALIFICATION OF JUDGE DUE TO BIAS OR PREJUDICE PURSUANT TO 28 U.S.C. SECTION 144

Plaintiff, RENEE' BRADFORD, files herewith her affidavit as required by Title 28, United States Code, Section 144, to show that the HONORABLE JUDGE GEORGE N. LEIGHTON has a personal bias or prejudice against her, or a bias in favor of the defendants herein.

Based thereon, plaintiff RENEE' BRADFORD respectfully moves that the HONORABLE JUDGE GEORGE N. LEIGHTON proceed no further herein and that another judge be assigned to both hear this motion and the subsequent proceedings herein.

BY: /s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10 day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

STATE OF ILLINOIS)
)
COUNTY OF COOK)

AFFIDAVIT OF RENEE' BRADFORD,
PLAINTIFF, IN SUPPORT OF MOTION
TO DISQUALIFY JUDGE
FOR BIAS OR PREJUDICE PURSUANT TO
28 U.S.C. SECTION 144

I, RENEE' BRADFORD, being duly sworn, say:

1. I am one of the plaintiffs in the lawsuit, *SILAS J. ALEXANDER, ET AL., VS. CHICAGO PARK DISTRICT, ET AL.*

2. I am informed and believe, and based on such information and belief, allege that the HONORABLE JUDGE GEORGE N. LEIGHTON, the judge before whom this cause is pending, has a personal bias or prejudice against me, or a bias in favor of the defendants herein.

3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the Affidavits of EARL B. DICKERSON, LAWRENCE KENNON, FAITH RICH, and TIMUEL BLACK which are attached hereto and made a part hereof.

BY: /s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10th day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

CERTIFICATE OF COUNSEL

I, RUFUS COOK, lead counsel herein, in accordance with the provisions of Title 28, U.S.C. Section 144 hereby state that this Motion and the Affidavits in support thereof, and this Certificate of Counsel are all made in good faith.

BY: /s/ Rufus Cook
Rufus Cook

SUBSCRIBED AND SWORN TO
before me this 10th day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

AFFIDAVIT

I, EARL B. DICKERSON, being first duly sworn, do hereby depose and say:

1. I am a black lawyer licensed to practice in Illinois, residing at 4800 South Lake Shore Drive. I graduated with the A. B. Degree from the University of Illinois in 1914, and enrolled in the University of Chicago Law School. After service in the American Expeditionary Force in Europe during the First World War, I returned to the University of Chicago Law School, where I graduated in 1920, and was admitted in the same year to the Illinois Bar. I began the practice of law in Chicago in 1920, and in that year also became General Counsel of the Supreme Life Insurance Company. In October, 1955 I was elected President and Chief Executive Officer of Supreme Life, which positions I held until 1971, when I became Chairman of the Board of Directors, in which position I served until January, 1973 when, upon retirement, I became Honorary Chairman of the Board.

In the years from 1920 down to the present day, I have been active in matters having to do with civil rights. I served as a member and acting chairman of President Roosevelt's first Fair Employment Practices Commission in 1940. I have served as President of the National Lawyers' Guild, and as Chairman of the Board of Directors of the Chicago Urban League. I was for more than 25 years, beginning about 1937, a member of the National

Board of Directors of the National Association for the Advancement of Colored People. I was Chairman of and worked with the Legal Redress Committee of the Chicago Branch, N.A.A.C.P. during the decades of the 1930's, 1940's, and into the 1950's. I was counsel in the case of *Hansberry* v. *Lee,* in which the United States Supreme Court struck down restrictive racial covenants in housing. I served as counsel in numerous other cases brought by or on behalf of the N.A.A.C.P. in Chicago and elsewhere.

2. During 1957, Mr. Theodore Jones served under me as Vice-President and Comptroller of the Supreme Life Insurance Company and occupied an office next to mine at the Company Headquarters. As a national board member of the N.A.A.C.P. residing in Chicago, I was requested, in the fall of 1957, to recommend a person to serve as the next president of the Chicago Branch. I called Mr. Jones into my office and inquired, in the presence of the National Branch Co-ordinator, who was visiting Chicago at the time, as to whether he would be willing to serve. Mr. Jones asked to be excused for a moment, and left the room. Since he appeared to be gone for a long time, I stepped next door to his office to determine what the trouble was. I found Mr. Jones engaged in a telephone conversation with Mr. William Dawson, then Democratic Ward Committeeman of the Second Ward in Chicago. Mr. Jones, as he confirmed when the conversation was concluded, had sought and obtained the approval and support of Mr. Dawson in Mr Jones' effort to become president of the Chicago Branch of the N.A.A.C.P.

I subsequently attended the Chicago Branch N.A.A.C.P. election held in the late fall of 1957. I observed present, there and voting a large number of members of Mr. Dawson's Second Ward Organization, who had not theretofore been known to me to be members of the N.A.A.C.P.

Mr. Jones was elected that evening as President of the Chicago Branch of the N A.A.C.P.

FURTHER AFFIANT SAYETH NOT.

/s/ Earl B. Dickerson
Earl B. Dickerson

SUBSCRIBED AND SWORN TO
before me this 28th day
of October, 1982

/s/ Agnes F. Hales
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

AFFIDAVIT

I, FAITH RICH, being first duly sworn, do hereby depose and say:

1. I have been a member of the National Association for the Advancement of Colored People continuously since 1945. I received the B. A. Degree from the University of Vermont in 1928, and the Ph.D. Degree from Bryn Mawr College in 1934. I am presently retired from employment with the Chicago Board of Education.

2. For several years prior to 1957 I worked with the west side and north side units of the N.A.A.C.P., and with the Chicago Branch, concerning myself in particular with matters related to education. From 1945 through 1957 I worked with the city-wide education committee of the Chicago Branch and, during 1955 to 1957, the north side unit to produce a study entitled *De Facto Segregation in Chicago Public Schools*, which was issued by the Chicago Branch of the N.A.A.C.P. in 1957, prior to the election of Theodore Jones to the presidency of the Chicago Branch in late fall, 1957. Two pertinent pages of that study are attached to this Affidavit. The study, together with data obtained by the north side unit, supplied the basis for the Chicago Branch N.A.A.C.P. and its north side unit to confront the Chicago Board of Education and the City of Chicago, and to challenge their published plans for construction and pupil assignment activities which would increase, rather than decrease,

segregation in the school system, and particularly on the north side of Chicago. I was personally involved in communications conducted with the Board of Education and the City in 1956 and 1957 based on the matters substantiated in the study. Those communications were, through 1957, conducted by the north side unit with the active support of the Chicago Branch of the N.A.A.C.P., and had, by December, 1957, progressed to the point where the N.A.A.C.P.'s representatives, including myself, and the representatives of the City and the Board of Education, were tentatively prepared to agree on alternative plans to those which the N.A.A.C.P. opposed.

After Mr. Jones was elected president of the Chicago Branch and took office in January, 1958, the support of the Chicago Branch for continued activity in this area was withdrawn. When the north side unit sought to continue the effort, Mr. Jones moved to abolish the unit. The Chicago Board of Education then proceeded to abandon the negotiations and to implement its original plans.

In or about 1967, several years after Mr. Jones' term had ended, the National Office of the N.A.A.C.P. authorized the establishment of three coequal Chicago Branches — the south side, the west side and the north side.

FURTHER AFFIANT SAYETH NOT.

/s/ Faith Rich
Faith Rich (Dr.)

SUBSCRIBED AND SWORN TO
before me this 29th day
of October, 1982
/s/ Lillian Schean

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

AFFIDAVIT

I, LAWRENCE KENNON, being first duly sworn, do hereby depose and say:

1. I am a lawyer licensed to practice in the state of Illinois, having been admitted to the bar in 1956 after having received the B.S. and J.D. Degrees from De Paul University. I am presently a partner in the law firm of WASHINGTON, KENNON, HUNTER and SAMUELS, located at 2600 South Michigan, Chicago, Illinois.

In the years from 1946 to the present day I have been involved and active in the civil rights movement. I have been a member since 1946 of the Chicago Branch of the National Association for the Advancement of Colored People. I was an Assistant State's Attorney of Cook County from 1957 to 1961, at the end of which time I participated in forming the law firm of which I am presently a partner. During the years since 1957, I have represented individuals and organizations involved in the civil rights struggle, including the N.A.A.C.P., the Co-Ordinating Council of Community Organizations, the Mississippi Freedom Democratic Party, the Afro-American Patrolman's League, the American Civil Liberties Union, and others.

2. I attended the meeting held in the fall of 1957, when Theodore Jones was elected President of the

Chicago Branch, N.A.A.C.P. Prior to Mr. Jones' election, the Chicago Branch and northside, westside and Hyde Park units were actively involved in pursuing civil rights matters in their respective spheres, of which several entailed challenges of various types to actions taken by the Democratic Party and/or the City of Chicago. Prior to 1958 the units were the action arms of the Chicago Branch of the N.A.A.C.P., and were for several years the sources through which the Chicago Branch gathered data from which to identify areas for action and, once such areas were identified, the units were the primary source of local manpower and talent for addressing whatever problem was to be addressed. The Chicago Branch itself served as the headquarters, the central governing body and, through its Legal Redress Committee, as the mechanism through which legal initiatives were taken on behalf of blacks in Chicago. When the Legal Redress Committee was chaired by Earl B. Dickerson and his successors, the administration of the Chicago Branch was not directly connected to the Chicago Democratic Party. The principal thrust of the Chicago Branch at that time, prior to 1957, was in the area of utilizing the units or their equivalents, on the one hand, for data-gathering, issue identification, and direct action, utilizing the Branch and its Legal Redress Committee, on the other hand, for co-ordination and vindication of the rights of black people in the courts.

I was Adult Advisor to the westside youth council of the N.A.A.C.P. in 1957, 1958 and 1959. Immediately prior to the election of Theodore Jones, prominent among the matters with which the westside unit and its youth council were concerned were:

(a) Protest and planned legal action against racial discrimination fostered by the Chicago Board of Education and then Superintendent Benjamin Willis, and the City of Chicago.

(b) Charges of discrimination and planned legal action against the City of Chicago and Chicago Board of Education for fostering and

failing to combat discrimination in the labor unions supplying tradesmen to city agencies and to the Chicago Board of Education.

(c) Demonstrations and protests against the racially discriminatory policies of the Chicago Park District.

With respect to the Chicago Park District in particular, one of the defendants in the litigation in which this Affidavit is submitted, the westside unit and its youth council were involved during the summer of 1958 with demonstrations and protests against the District triggered by the beatings by whites of several blacks who had sought to use the facilities at Rainbow Beach, then a segregated beach located at and south of 75th Street. We charged the Park District, among other things, with maintaining racially segregated facilities and failing to provide protection to black persons seeking to use facilities traditionally used by whites.

During 1957 the N.A.A.C.P. westside unit, its westside youth council and other N.A.A.C.P. units were supported by the Chicago Branch in the principal activities outlined above, having to do with the City of Chicago and the Chicago Board of Education and schools discrimination, and the City of Chicago, the Board of Education, and labor union discrimination. In the year 1957 the administration of the Chicago Branch N.A.A.C.P. was headed principally by persons having no apparent ties to the Chicago Democratic Party.

After the election of Theodore Jones in late fall of 1957, support of the Chicago Branch for the activities of the westside unit was withdrawn. Mr. Jones' election, on information and belief, was made possible by an agreement made between himself and William Dawson, under which certain activities of the Chicago Branch N.A.A.C.P. were to be discontinued by Jones and his administration in exchange for which Jones and his administration were to receive the support of Dawson and the Democratic Organization. Mr. Dawson was at

that time Ward Committeeman of the 2nd Ward Regular Democratic Organization, and the publicly acknowledged leader of the 3rd, 4th, and 20th Wards. Mr. Jones named as his administration's Chairman of the Legal Redress Committee of the Chicago Branch, and legal adviser to the president, George Leighton, who, on information and belief, was also connected to the Democratic Organization in that he had been President of the Third Ward Regular Democratic Organization, and continued to be active in the Chicago Democratic Organization.

During 1958, after Mr. Jones' election, the activities of the westside unit detailed above received virtually no support from the Chicago Branch. The process of withdrawal of support by the Jones administration, which included George Leighton as legal counsel, resulted in a number of challenges being made from time to time in N.A.A.C.P. meetings to the legality and propriety of actions taken by the Jones administration. These challenges were often referred to and decided in those meetings by George Leighton, whose opinions consistently favored whatever position had been taken by Mr. Jones.

In August, 1958, Theodore Jones moved to abolish the units of the Chicago Branch. Almost simultaneously, and contrary to the by-laws and rules of the organization, he (1) illegally increased the 35-member Executive Committee by 5 persons, (2) illegally "authorized" those 5 newly-appointed persons to vote on the issue of abolition of the units; (3) illegally failed to provide notice to the units or their chairmen of the action to be taken, thus refusing to afford them an opportunity to be heard. Challenges made to the legality of these actions were rebuffed, based in part on legal opinions supplied by George Leighton.

Before the illegal and improper actions to be taken by the Jones administration were made known to the membership, Mr. Jones caused to be published in Chicago and national publications statements to the effect that

the units were to be abolished to rid the N.A.A.C.P. of "communist influences." No evidence was ever produced to support that allegation regarding a single person and, to the best of my knowledge, not one of the persons active in the units was then or has since been in any way shown to have been subject to any such influence. By making that completely unfounded public accusation, however, for which he had no authority from the Board of Directors, Mr. Jones and his administration dealt a grievous blow to the Chicago N.A.A.C.P., and cast aspersions on the character and reputation of persons who were never afforded the opportunity to defend themselves, and who were ousted from the organization by means of procedures rife with irregularities.

During the two years of Mr. Jones' Presidency, the Chicago Branch N.A.A.C.P. effectively abandoned opposition to the discriminatory policies of the City of Chicago and the Chicago Board of Education, and the president abandoned support for the efforts then being made to fight the discriminatory practices of the Chicago Park District. Leadership in these areas was largely assumed by an organization called the Co-Ordinating Council of Community Organizations, formed in part to fill the void left by the inaction of the Chicago Branch N.A.A.C.P. during Mr. Jones' administration. During this period, I am aware of no initiatives taken by the organization or its Legal Redress Committee, chaired by George Leighton, to challenge the discriminatory policies of the City of Chicago or the Chicago Board of Education.

Far from supporting and furthering the interests of black people, the two-year administration of Theodore Jones resulted in acts consistently inimical to the interests of black people, including abandonment of the initiatives theretofore begun against agencies of local government, violation of the by-laws and rules of the organization, abolition of the units, and a cessation of the traditional role of the Legal Redress Committee—vindication of the legal rights of blacks. I, and many others who were active in the Chicago Branch N.A.A.C.P. and its

units during 1957-1959, seriously dispute the credibility of Theodore Jones and those in power during his administration as persons seriously concerned with furthering the interests of black people.

FURTHER AFFIANT SAYETH NOT.

/s/ Lawrence Kennon
Lawrence Kennon

SUBSCRIBED AND SWORN TO
before me this 3 day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, ET. AL.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, ET AL.,

Defendants.

NO. 79 C 2242

AFFIDAVIT

I, TIMUEL D. BLACK, being first duly sworn, hereby depose and say:

1. I am a resident of Chicago, Illinois. I received the B.A. Degree from Roosevelt University in 1952, and the M.A. Degree from the University of Chicago in 1954, after which time I completed all classwork requirements for the PH.D Degree in Educational Administration at the University of Chicago. I have taught in the public schools of Gary, Indiana and Chicago, Illinois. I served as Assistant Director of the National Teacher Corps, and have served as a Dean with the City Colleges of Chicago, as Vice-President of Academic Affairs at Olive-Harvey College, and as Director of Community Affairs for the City Colleges of Chicago. I am currently serving as full Professor of Social Sciences at Loop College.

I have served and presently serve as a member of the Board of Directors and the Executive Committee of the Chicago Branch of the American Civil Liberties Union; as a member of the National Board of Directors of Americans for Democratic Action; as Board Member of the Independent Voters of Illinois; as Vice-President of the Chicago-Area Alliance of Black School Educators, and as a member of the Board of Directors of Friends of The Parks.

I have read the Affidavit signed by Lawrence Kennon relative to this litigation. I have personal knowledge of the events described on pages 2 through 7 thereof, and would testify to substantially the same effect if I were called as a witness in the case.

I also attended the fall, 1957 meeting of the Chicago Branch N.A.A.C.P. at which Theodore Jones was elected president. Aside from precinct workers and captains from the Second Ward Organization of which William Dawson was committeeman, I saw precinct captains and workers from the 3rd, 4th and 20th Wards, all at that time publicly acknowledged to be under the leadership of William Dawson.

In addition to the matters related in the Kennon Affidavit, I was one of several persons who sought, while Theodore Jones was President and George Leighton was Legal Redress Committee Chairman of the Chicago Branch N.A.A.C.P. to have the organization fulfill one of its traditional roles by moving legally against the City of Chicago and the Chicago Board of Education to remedy discrimination against blacks. In particular, in 1957 and 1958 we sought, in the wake of the decision of the United States Supreme Court in Brown v. Board of Education, to have the N.A.A.C.P. Legal Redress Committee seek the cessation of segregation in the Chicago Public Schools. We were rebuffed by Mr. Leighton and Mr. Jones.

I and others also sought in 1957 and 1958 to have the N.A.A.C.P. and the Legal Redress Committee press the City of Chicago legally on the issue of housing segregation. Again, we were refused by Mr. Leighton and Mr. Jones.

The events surrounding the election of Mr. Jones in 1957 and, with respect to matters involving any challenge to City Government and/or the Democratic Party, the subsequent inaction of the N.A.A.C.P. and its Legal Redress Committee, were the result of a deal whereby the Chicago Branch N.A.A.C.P. became a captive of the

Democratic Party. The actions taken by Theodore Jones and George Leighton during 1957, 1958 and 1959 pitted the leadership of the Organization against its members, and were opposed to the interests of black people and the Organization itself. On the basis of the events known to me, neither of those individuals possesses any credibility as a spokesman for the interests of black people. Mr. Jones' actions as a member of the Board of Commissioners of the Chicago Park District, which I have observed, are consistent with the actions and positions taken by him in 1957-59 in the N.A.A.C.P., where, as with the Park District, he and George Leighton served the interests of the Cook County Democratic Party.

FURTHER AFFIANT SAYETH NOT.

/s/ Timuel D. Black
Timuel D. Black

SUBSCRIBED AND SWORN TO
before me this 3rd day
of November, 1982

/s/ Lillian Schean
Notary Public

[Memorandum Of Law Was Not Included]

APPENDIX 3B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, ET AL.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, ET AL.,

Defendants.

NO: 79 C 2242

MOTION FOR DISQUALIFICATION OF JUDGE
PURSUANT TO 28 U.S.C. SECTION 455 (a)

Plaintiff, RENEE' BRADFORD, shows that the HONORABLE JUDGE GEORGE N. LEIGHTON, is disqualified from presiding as judge at the trial of the above-numbered and entitled cause under the provisions of 28 U.S.C., Section 455(a) because his impartiality might reasonably be questioned, as more fully set forth in the affidavit attached hereto and made a part hereof.

Wherefore, plaintiff, RENEE' BRADFORD, moves that the HONORABLE JUDGE GEORGE N. LEIGHTON declare himself disqualified to sit on the hearing of this cause and that another judge be assigned to hear motion and action.

/s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10th day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT IN SUPPORT OF MOTION
FOR DISQUALIFICATION OF JUDGE
PURSUANT TO TITLE 28 U.S.C. SECTION 455(a)

I, RENEE' BRADFORD, being duly sworn say:

1. I am one of the plaintiffs in the lawsuit, *SILAS J. ALEXANDER, ET AL.*, v. *CHICAGO PARK DISTRICT, ET AL.*

2. I am informed and believe, and based on such information and belief, allege that JUDGE GEORGE N. LEIGHTON'S "impartiality might reasonably be questioned", and he is therefore disqualified to act in this cause under the provisions of Title 28, U.S.C. Section 455(a).

3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the Affidavits of EARL B. DICKERSON, FAITH RICH, LAWRENCE KENNON and TIMUEL BLACK which are attached hereto, incorporated by reference herein and made a part hereof.

/s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10 day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

[REFER TO AFFIDAVITS SUPPORTING § 144
MOTION SET FORTH AS EXHIBIT 3A]

[MEMORANDUM OF LAW NOT INCLUDED]

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs.

CHICAGO PARK DISTRICT, et al.,

Defendants.

No. 79 C 2242

Before the Honorable GEORGE N. LEIGHTON
United States District Judge

Memorandum

Relying on 28 U.S.C. §§144 and 455(a), Renee Bradford, one of 35 Negro and Hispanic plaintiffs in this class suit, has filed two motions seeking to disqualify the court from further participation in this case. Briefs and memoranda have been filed; and from the contentions of the parties, two issues are presented. First, whether under the circumstances of this case, the disqualification motions should be transferred for hearing to another judge of this court. Second, if there is no transfer, whether the affidavits in support of the motions are legally sufficient and timely.

After considering the question of transfer, the motions, the affidavits supporting them, the record of these proceedings, and applying the controlling principles of law, this court concludes that transfer of the disqualification motions to another judge of this court is not warranted; and that the affidavits are neither timely nor sufficient. Therefore, for the following reasons, the motions to transfer and to disqualify the court are denied.

I.

This suit was filed on June 1, 1979 by Dorothy Ware, as the sole plaintiff. Suing under 42 U.S.C.§§1983 and 1988, she alleged in a three-count complaint that the defendants Chicago Park District, its Attorney and Agent, its Commissioners from 1976 to 1979, and its General Superintendent, were liable for the deceit and fraud that deprived her of property interests in a certificate of sale assigned to her by the purchaser at a foreclosure of delinquent real estate taxes. Ms. Ware alleged that the real estate in question was a walled vacant lot at 5017 South Ellis Avenue in the city of Chicago that had a value of $350,000. She did not purport to represent a class; nor did she allege any of racial other invidious discrimination by defendants. She prayed for injunctive relief, damages actual and punitive, and attorney's fees. The lawyer who filed her suit was Mr. Rufus Cook, who had also represented her in the state court proceedings which she described as a bitter and acrimonious dispute. Summons issued, defendants were personally served, they appeared, moved for and obtained an extension until July 5, 1979 to answer or otherwise plead to the complaint.

Before any defendant had answered, the amended complaint which is now the pleading in this case was filed. Silas J. Alexander was the lead plaintiff; Dorothy Ware and Renee Bradford were among the other 34 Negroes and Hispanics who alleged they were suing on behalf of themselves and others similarly situated, "all individual black, Latino or poor residents of the City of Chicago." In Counts I through IV and VII, plaintiffs alleged race discrimination in the allocation of Chicago Park District resources by defendants, race discrimination in employment practices in park district facilities, and race discrimination in the availability to Negroes and Hispanics of adequate protection in parks administered by defendants. They said that their claims arose under the Fourteenth Amendment to the Constitution of the United States, Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000(a), *et. seq.*, and

42 U.S.C. §1983. In Counts V and VI, Ms. Ware restated the claims she had made in her earlier complaint; the defendants were the same ones she had originally named with the addition of two Commissioners who had taken office early in 1979.

Thereafter, the parties proceeded with pretrial motions. Plaintiffs moved for class certification, with defined subclasses. Defendants moved to dismiss the amended complaint. The motions were set on briefing schedules, with an order that stayed discovery to await the court's rulings. Ultimately, defendants' motion was granted only as to the counts in which Dorothy Ware reasserted the claims she had made in her original complaint; thus, Counts I through IV and VII of the amended complaint remained for defendants to answer. Over defendants' strenuous and persistent objections, plaintiffs' motion to certify the class, and define subclasses, was granted. The case then entered the stage of discovery proceedings.

The discovery demands of the parties on one another began on July 30, 1979. Interrogatories were filed under the rules; motions for production of documents were made. Motions to compel production and answers were cross-filed. The intensity of the discovery disagreements required the court to refer these pretrial matters to a magistrate. This was done; and later, status reports were made to the court. An appeal from a ruling of the magistrate was taken to this court by defendants; and after hearing the parties, the magistrate's ruling which awarded plaintiffs attorney's fees in one of the discovery disputes was affirmed.

On December 2, 1981, plaintiffs filed a verified motion for a preliminary injunction in which they asked this court to immediately restrain and enjoin defendants from adopting or seeking to adopt any budget, plan or scheme for the expenditure of public funds used for park purposes which fails to provide for substantially equal allocation of funds "to park facilities without regard to race, color

or ethnic derivation of the users of the park facilities, or of the persons resident in the neighborhoods wherein the said facilities are located." They prayed for an injunction restraining defendants from adopting any plan or scheme for the expenditure of public funds which "fails to show on a per park basis the sums to be expended, in such fashion as to omit determination of whether and to what extent black and Latino parks are discriminated against in terms of allocation of funds, in violation of the fourteenth amendment to the Constitution of the United States and the Illinois Constitution [sic]."

Defendants objected to the motion. They argued that plaintiffs had filed their amended complaint in July 1979; that defendants, without any action by plaintiffs, had adopted budgets for the years 1980 and 1981; that the park district's 1982 budget was scheduled for public hearing on December 10, 1981, and was scheduled for consideration by its Commissioners on or before December 22. Therefore, defendants insisted that plaintiffs' motion for a preliminary injunction was not timely and did not deserve a hearing.

This court overruled defendant's objections and set the motion for a day certain. The hearing began on December 29, 1981. Three days were devoted to the taking of evidence; and at the end of that period, counsel for the plaintiffs requested that the matter be continued to allow presentation of other evidence, including a witness who had to travel a great distance in order to appear before this court. The request was granted, the matter was continued; and then, for various reasons, some a conflict in this court's trial schedule, others the inability of either plaintiffs' counsel or counsel for defendants to be in court, the hearing extended over seven additional court sessions. When plaintiffs rested their case in chief, defendants moved for a direct finding in their favor; this court denied the motion and required them to introduce evidence.

One of the defendants in this case is Mr. Theodore Jones who until early in 1979 was a Chicago Park District Com-

missioner. He is a Negro, well-known in Chicago as a businessman who for many years has been active in the civic affairs of the Negro community of the city. This judge, when he was a practicing lawyer and also active in the civic affairs of Chicago, became acquainted with Mr. Jones. In a general way, they were co-workers in many civic activities, all having as their purpose the eradication of racism in the life of the American Negro in the city of Chicago.

On perhaps two social occasions, this judge and his wife visited the home of Mr. and Mrs. Jones. In 1957 and 1958, Mr. Jones was elected president of the Chicago Branch, National Association for the Advancement of Colored People. It is well known that in both state and federal levels, Mr. Jones has worked in and with private organizations and public agencies whose aims are the prohibition and elimination of race discrimination against Negroes in work opportunities.

When the lawyers for the parties informed the court that they were about to conclude presentation of evidence in the preliminary injunction proceedings, it inquired if either of them was going to call Mr. Jones as a witness. Both parties disclosed that they did not intend to call him. The court, for the record, revealed its acquaintance with Mr. Jones and expressed the desire to hear from him. Because he was a Chicago park district Commissioner, a citizen who has been active in the Negro community of Chicago, this court believed that Mr. Jones' testimony would assist it in resolving the controversy presented by plaintiffs' motion for a preliminary injunction. As a consequence of the court's colloquy with counsel, Mr. Jones was informed about the court's request and he appeared. He was initially questioned by the court. His testimony covered his personal background and his knowledge of the policies of the Chicago Park District.

Then, after hearing all the evidence which the parties had to offer, and making scheduling accommodations for them, the court heard their counsel in oral argument. It

invited them to propose findings of fact, suggest conclusions of law, and support their respective positions with post-trial briefs. The matter was set for ruling; and on September 30, 1982 the court made its findings of fact, and reached its conclusions of law.

One of the findings was that:

> Theodore Jones was called as the court's witness. During his tenure as a [Park District] Commissioner, Mr. Jones attended most meetings of the Park District Board. He is personally familiar with several parks. With respect to personnel, he initiated and won approval of an affirmative action employment program. He testified concerning the responsiveness of the Park District Board to his suggestions which included capital improvements at the South Shore Country Club and Jackson Park, a golf driving range on the South Side, funding for the DeSable Museum of African American History, and work at the 31st Street Beach.

Concerning these facts, the court concluded, in part, that:

> [In his testimony Mr. Jones] would have disclosed, as candidly as he testified, any basis that would support the plaintiffs in this case. He did not. Taking his testimony, together with all the other evidence this court has heard, the court is satisfied that there is very little likelihood of plaintiffs succeeding on the merits at trial in this case.

Accordingly, plaintiffs' motion for preliminary injunctive relief was denied.

Renee Bradford was not a witness during the preliminary injunction proceedings; nor did she appear in court either before or during the hearing of the motion. She has never been before this court; and her affidavits do not contain any averment which would show that she personally knows this judge, or that he knows her. She does

not claim any experience from which it could reasonably be inferred that this judge has ever had the occasion to manifest any feeling of prejudice toward her personally. It does not appear either from any affidavit, claim, or reference to any portion of the record, that this judge has ever said anything to or about Ms. Bradford.

However, on November 12, 1982, she filed a motion for disqualification of judge due to bias or prejudice pursuant to 28 U.S.C. §144, saying that the court "has a personal bias or prejudice against her, or bias in favor of the defendants herein." She moved that this court "proceed no further herein and that another judge be assigned to both hear this motion and the subsequent proceedings herein." On the same day, she filed a motion for disqualification of judge pursuant to 28 U.S.C. §455(a) saying that this judge is disqualified from presiding at the trial of the above-numbered and entitled cause "under the provisions of 28 U.S.C. §455(a) because his impartiality might reasonably be questioned, as more fully set forth in the affidavit attached hereto and made a part hereof." She moved that this judge "declare himself disqualified to sit on the hearing of this cause and that another judge be assigned to hear this motion and action." The affidavit supporting her Section 144 motion is as follows:

I, Renee Bradford, being duly sworn, say:

1. I am one of the plaintiffs in the lawsuit, *Silas J. Alexander, et al* v. *Chicago Park District, et al.*

2. I am informed and believe, and based on such information and belief, allege that the Honorable George N. Leighton, the judge before whom this cause is pending, has a personal bias or prejudice against me, or a bias in favor of the defendants herein.

3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of Earl B. Dickerson, Lawrence Kennon, Faith Rich, and Timuel Black, which are attached hereto and made a part hereof.

The following is her affidavit in support of the motion under 28 U.S.C. §455(a):

> I, Renee Bradford, being duly sworn, say:
>
> 1. I am one of the plaintiffs in the lawsuit, *Silas J. Alexander, et al.* v. *Chicago Park District, et al.*
>
> 2. I am informed and believe, and based on such information and belief, allege that Judge George N. Leighton's 'impartiality might reasonably be questioned', and he is therefore disqualified to act in this cause under the provisions of Title 28, U.S.C. §455(a).
>
> 3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of Earl B. Dickerson, Faith Rich, Lawrence Kennon and Timuel Black, which are attached hereto, incorporated by reference herein and made a part hereof.

II.

A

We begin with the observation that the mere filing of an affidavit of prejudice does not require a judge to recuse himself. On the contrary, a judge has the affirmative duty to inquire into the legal sufficiency of such an affidavit and not disqualify himself unnecessarily, particularly, where the request for disqualification was not made at the threshhold of the litigation and the judge has acquired valuable background of experiences with the case. *National Auto Brokers* v. *General Motors Corporation,* 572 F.2d 953, 958 (2d Cir. 1978); *Raitfort* v. *Bradley,* 446 F.Supp. 129, 130 (E.D. Pa. 1978).

It has been said by an able and experienced district judge of this circuit that "[w]hen a party has filed an affidavit alleging personal bias or prejudice on the part of a judge before whom a matter is pending, that judge has the obligation to determine the legal sufficiency of the affidavit because only '[h]e knows fully his own thoughts and feelings in the complete context of facts al-

leged.'" *Matter of Searches Conducted on March 5, 1980,* 497 F.Supp. 1283, 1287 (E.D. Wis. 1980), quoting Sirica, J., in *United States* v. *Mitchell,* 377 F.Supp. 1312 at 1315 (D. D.C. 1974). Consistent with this statement, our court of appeals has held that when a district judge is presented with a motion asking for his recusal, he is "entitled to pass upon the sufficiency of the affidavit, but, of necessity, all factual allegations [have] to be taken as true." *Action Realty Co.* v. *Will,* 427 F.2d 843, 844 (7th Cir. 1970); see *Berger* v. *United States,* 255 U.S. 22, 32 (1921). And recently, Judge Aspen of this court had occasion to say that "[a]lthough judges have, on occasion, referred the question of their own disqualification to another judge for disposition, we think the better procedure in this case is for the judge presiding over the case to resolve the motion for disqualification since [he is] in the best position to appreciate the circumstances surrounding the allegations in the affidavits." *U. S.* v. *Professional Air Traffic Controllers Org.,* 527 F.Supp. 1344, 1352 (N.D. Ill. 1981).

In what is perhaps the latest word on this subject uttered by any federal court of appeals, the Fifth Circuit, in *Chitimacha Tribe of Louisiana* v. *Harry L. Laws Co.,* 690 F.2d 1157, 1162 (5th Cir. 1982), pointed out that "[t]he challenged judge is most familiar with the alleged bias or conflict of interest. He is in the best position to protect the nonmoving parties from dilatory tactics." Then, calling attention to *United States* v. *Haldeman,* 559 F.2d 31, 131 (D.C. Cir. 1976) for the proposition that submitting recusal motions to fellow judges for decision is at most permissive, the court went on to say that "[r]eferring the motion to another judge raises problems of administrative inconvenience and delay."

This court agrees. Plaintiffs' case has been on this court's docket since June 1, 1979. In the period of about two and a half years, during which hundreds of orders have been entered, a preliminary injunction motion has been heard, the court has acquired a valuable background of experience concerning the case. It now understands

the plaintiffs' theories and the contentions made on their behalf by their lawyers. More importantly, the court knows and understands, at least so it believes, the lead lawyer for the plaintiffs, Mr. Rufus Cook. From his demeanor in court, his attitude, and what he has said orally and in writing, the court has gained the distinct feeling that he harbors an intense hatred for the defendants and the lawyers who represent them. Defendants' lawyers, on the other hand, never seem to miss an opportunity to respond to Mr. Cook, in kind, and displaying their own brand of his attitude. This court fully knows its thoughts and feelings about the plaintiffs, the defendants, and the context of the facts alleged in the affidavits filed in support of the recusal motions. It knows the duty owed to all the parties to see that dilatory tactics not be condoned, that problems of administrative inconvenience not be raised, and that the case proceed to trial so that justice will be done in accordance with the law and the evidence.

Under these circumstances, it would be judicial cowardice of the first order for this court, as moved by plaintiff Renee Bradford in her two motions, "to proceed no further herein and that another judge be assigned to hear these motions. . . ." Therefore, the disqualification motions will not be transferred to another judge; instead, this court will discharge its duty and proceed to determine the timeliness and legal sufficiency of the affidavits filed in support of the motions to recuse. *United States* v. *Azhocar,* 581 F.2d 735, 738 (9th Cir. 1978); *Action Realty Co.* v. *Will,* 427 F.2d 843, 844 (7th Cir. 1970); Wright, Miller & Cooper, Federal Practice and Procedure §3551.

B

As to the question of timeliness, it should be noticed that when Congress gave a party in a district court proceeding the right to move for the recusal of a judge, the first obligation it imposed on the movant was that he file "a timely . . . affidavit." See Act Mar. 3, 1911 c. 231, §31, 36 stat. 1090; 1949 U.S. Code Cong. Service p. 1248; 28

U.S.C. §1944. It is now settled that this time requirement applies with equal force to a motion under 28 U.S.C. §455(a). *In re: International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *City of Cleveland* v. *Cleveland Elec. Illuminating Co.*, 503 F.Supp. 368, 379 (N.D. Ohio 1980). Its purpose is to prevent litigants from abusing motions to disqualify, using them as dilatory tactics, or as means to sample the temper of the court before deciding whether to raise an issue of disqualification. *Peckham* v. *Ronrico Corp.*, 288 F.2d 841, 843 (1st Cir. 1961); see 48A C.J.S. Judges §136.

Section 144 provides that the affidavit "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard. . . ." This provision, however, is no longer pertinent because terms in federal district courts have been abolished, although the procedure still requires that an affidavit be timely filed. *Smith* v. *Danyo*, 441 F.Supp. 171, 175 (N.D. Pa. 1977). And whenever the question is raised, the inquiry into timeliness, either under Section 144 or Section 455(a), is concerned with the movant's reasonable diligence in filing the affidavit. *Samuel* v. *University of Pittsburgh*, 395 F.Supp. 1275, 1279 (W.D. Pa. 1975), *vacated on other grounds*, 538 F.2d 991 (3d Cir. 1976). An affidavit is untimely under either statute if the affiant, after knowledge of facts showing supposed bias, has invoked or sought to invoke the court's affirmative action on his behalf before claiming prejudice on the part of the judge. "If the alleged information upon which the Motion for Disqualification is based was known or knowable to the movant a considerable period of time prior to the Motion, then such Motion is untimely." *Rademacher* v. *City of Phoenix*, 442 F.Supp. 27, 29 (D. Ariz. 1977). For, as our court of appeals has said, "one must raise the disqualification of the judge at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification. *United States* v. *Patrick*, 542 F.2d 381, 390 (7th Cir. 1976).

The records of this case show that on September 3, 1982, the day Mr. Jones testified, Ms. Bradford's lead counsel, Mr. Rufus Cook was in court. This judge, candidly and fully, disclosed his acquaintance with Mr. Jones and revealed the importance he attached to the testimony he was about to hear. The findings of fact and conclusions of law filed on September 30 merely formalized what the court stated from the bench. And certainly, on September 3, Ms. Bradford and her lawyer Mr. Cook knew or should have known every detail of the facts stated in the affidavits of Messrs. Dickerson, Kennon, Black, and in that of Ms. Rich because what these affiants recite were matters of common knowledge in the Negro community of Chicago, and many of these facts were reported in Chicago newspapers, and some can be found in public records. For these reasons, it is specious to argue, as Mr. Cook does on Ms. Bradford's behalf, that the significance of the facts attested to by the affiants were not known until "after the transcript of the relevant court proceedings became available after October 20, 1982." A lawyer does need the transcript of relevant court proceedings in order to know commonly known facts and what is revealed to him, in open court, by a presiding judge. But more importantly, this argument does not explain why Ms. Bradford waited until November 12, 1982, more than two months after the relevant facts were either known or knowable to her, before she filed her motions for disqualification of the court. The really honest explanation is that Ms. Bradford and her lawyer, all the facts being known or knowable to them on September 3, 1982, waited until this court denied plaintiffs' motion for a preliminary injunction on September 30, 1982, and then filed the motions to recuse.

A litigant should not be permitted to use disqualification motions as a means of "sampling the temper of the court before deciding whether or not to file an affidavit of prejudice. . . ." *Peckham* v. *Ronrico Corporation,* 288 F.2d 841, 843 (1st Cir. 1961). "One of the reasons for requiring promptness in filing the affidavit is that a party, knowing

of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes subsequent treatment that he receives." *In re United Shoe Machinery Corporation*, 276 F.2d 77, 79 (1st Cir. 1960). *In City of Cleveland* v. *Cleveland Elec. Illuminating Co.*, 503 F.Supp. 368 (N.D. Ohio 1980), the court, citing from another case, told the movant before it that:

> The judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming. 503 F.Supp. at 381.

Ms. Bradford must be told the same words. Her affidavits were not timely filed, and for this reason alone her motions to recuse should be denied. *United States* v. *International Business Machines Corp.*, 539 F.Supp. 473 (S.D. N.Y. 1982); see *Duplan Corporation* v. *Deering Milliken, Inc.*, 400 F.Supp. 497 (S. S.C. 1975); Annot. 24 A.L.R.Fed. 290. But there are additional reasons why her motions cannot be granted.

C

Section 144 of Title 28, United States Code, provides that:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, . . .

When faced with a motion under this statute, the court focuses on the movant's affidavit. *Chitimacha Tribe of*

Louisiana v. *Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982). It is well settled that the affidavit must be sworn to by a party to the action, *Giebe* v. *Pence*, 431 F.2d 942 (9th Cir. 1970), and not even one by counsel will meet this statutory requirement. *United States ex rel. Wilson* v. *Coughlin*, 472 F.2d 100, 104 (7th Cir. 1973); cf. *Paschall* v. *Mayone*, 454 F.Supp. 1289, 1300 (S.D. N.Y. 1978).

The affidavit must identify with particularity time, place, persons, and circumstances supporting the affiant's belief of personal bias against him or in favor of his opponent; and it must be of sufficient detail so "that the affiant would expose himself to a charge of perjury, if he were guilty of swearing to statements that he knew to be false." *Roussel* v. *Tidelands Capital Corp.*, 438 F.Supp. 684, 690 (N.D. Ala. 1977). This requirement, and that it be accompanied by counsel's affidavit of good faith, are designed to protect the integrity of the judicial system and prevent abuse of the recusal procedure. *Matter of Searches Conducted on March 5, 1980*, 494 F.Supp. 1283, 1288 (E.D. Wisc. 1980).

It has been said that for alleged bias or prejudice to be sufficient to require recusal, it "must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Wilks* v. *Israel*, 627 F.2d 32 (7th Cir. 1980). The alleged bias or prejudice must be personal and not judicial; it must bear directly on the current proceeding. *Matter of Searches Conducted on March 5, 1980*, 497 F.Supp. 1283, 1288 (E.D. Wisc. 1980). Moreover, the facts alleged in the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede partiality of judgment." *Berger* v. *United States*, 255 U.S. 22, 33 (1921). The standard under Section 144 is that of bias in fact. *Parish* v. *Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975); Note, Disqualification of Federal Judges for Bias or Prejudice, 46 U.Chi.L.Rev. 236, 243 & n.37, 244 (1978).

It is obvious, from even a cursory examination of it, that the affidavit with which Ms. Bradford supports her Section 144 motion is legally insufficient. She does not describe any circumstance which would establish her claim of personal bias or prejudice by this court against her, or in favor of defendants. The affidavit consists of the bold assertion that "[t]he facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of Earl B. Dickerson, Lawrence Kennon, Faith Rich, and Timuel Black, which are attached hereto and made a part hereof."

It happens that none of these affiants is a party to this suit, nor is it claimed they belong to the certified class. And it has been held "that the doctrine of incorporation by reference has no place in a §144 affidavit." *Hall* v. *Burkett*, 391 F.Supp. 237, 242 (W.D. Okla. 1975). This holding is mandated by the requirement that it is "a party to any proceeding in a district court. . ." who must make and file a timely and sufficient affidavit before the statute will become operative. 28 U.S.C. §144. However, since they are being used to bring the impartiality of this court into question, it is important that these four affidavits be examined.

A substantial part of each one consists of autobiographical data which reveal the following concerning each affiant. Mr. Dickerson states that he is a Negro lawyer, a graduate of the University of Chicago Law School who, since 1920 and until January 1973, when he retired, was an insurance company executive. Throughout his professional life, he has been active in the civil rights movement. Ms. Rich is a retired Chicago Board of Education employee, holder of a doctorate from Bryn Mawr College. Since 1945, she too has been active and interested in the civil rights field, particularly with the Chicago Branch, NAACP. Mr. Kennon is a Chicago lawyer who since 1946 has been a member of the Chicago Branch, NAACP, and active with various civil rights organizations in Chicago and in other parts of the country. Mr. Black is a graduate of Roosevelt University and holds a

master's degree from the University of Chicago. He is a doctoral candidate for a degree in educational administration from the University of Chicago. He has held a number of academic positions in Chicago institutions of learning, and presently is full professor of social science at Loop College.

The gist of Mr. Dickerson's affidavit is the description of a conversation that took place between him and Mr. Theodore Jones in the fall of 1957 when he, Mr. Dickerson, asked Mr. Jones if he would be willing to serve as president of the Chicago Branch, NAACP. According to Mr. Dickerson, the occasion was the presence in his office of the national branch coordinator of the NAACP. Mr. Jones asked to be excused; and when he did not return, Mr. Dickerson went to Mr. Jones' office and found him engaged in a telephone conversation with Congressman William L. Dawson, then Democratic Committeeman of the Second Ward in Chicago. Mr. Jones told Mr. Dickerson that he had sought and obtained the approval and support of Mr. Dawson in his effort to become president of the Chicago Branch, NAACP. Subsequently, Mr. Dickerson said he attended the branch election; he saw present and voting a number of persons from Mr. Dawson's Second Ward organization who had not been known to be members of the NAACP. Mr. Dickerson concludes his rather short affidavit with the statement that "Mr. Jones was elected that evening as President of the Chicago Branch of the N.A.A.C.P."

In her affidavit, Ms. Rich describes her efforts, prior to 1957 working with the Chicago west and northside units of the NAACP, and with the Chicago Branch, particularly in matters relating to education. She states that prior to Mr. Jones' election as president of the Chicago Branch in late fall 1957, the northside unit produced a study of de facto segregation in Chicago public schools, and issued by the Chicago Branch. She says that negotiations by a committee of which she was a member with the Chicago Board of Education had proceeded to a point in December 1957 that representatives

of the City of Chicago and the board of education "were tentatively prepared to agree on alternative plans to those which the N.A.A.C.P. opposed." She said that after Mr. Jones was elected and took office, the Chicago Branch withdrew its support of the activity in the area in which she had worked. When the northside unit sought to continue these efforts, says Ms. Rich, Mr. Jones moved to abolish the unit. Several years after Mr. Jones' terms ended, the national office of the NAACP authorized establishment of three co-equal Chicago Branches, the south, the west, and the northside branches.

In his affidavit, Mr. Kennon refers to the years in which he had "represented individuals and organizations involved in the civil rights struggle, including the N.A.A.C.P. . . ." He also attended the Chicago Branch election meeting in the fall of 1957 when Mr. Jones was elected president. Mr. Kennon states that prior to this election, the Chicago Branch and its other units "were actively involved in pursuing civil rights matters in their respective spheres, of which several entailed challenges of various types to actions taken by the Democratic Party and/or the city of Chicago." He goes on to aver that prior to 1958 these units "were the action arms of the Chicago Branch of the N.A.A.C.P. . . ." and were for several years the source of data gathered by the Chicago Branch for actions in civil rights matters. Mr. Kennon states that "[t]he principal thrust of the Chicago Branch at that time, prior to 1957, was in the area of utilizing the units or their equivalents, on the one hand, for data gathering, issue identification, and direction action, utilizing the Branch and its Legal Redress Committee, on the other hand, for co-ordination and vindication of the rights of black people in the courts."

Mr. Kennon then continues his recital of the history of the NAACP Chicago Branch and his role as an adult adviser to the West Side Youth Council in 1957, 1958 and 1959. He refers to the Chicago Park District, one of the defendants in this case, and states that there were

demonstrations and protests in the summer of 1958 "against the District triggered by the beatings by whites of several blacks who had sought to use the facilities at Rainbow Beach, then a segregated beach located at the south of 75th Street." He states that "[w]e charged the Park District, among other things, with maintaining racially segregated facilities and failing to provide protection to black persons seeking to use facilities traditionally used by whites."

Then Mr. Kennon refers to Mr. Jones' administration as president of the Chicago Branch that began in late fall 1957. He asserts that the branch's support of the westside unit was withdrawn under Mr. Jones. He avers that:

> Mr. Jones' election, on information and belief, was made possible by an agreement made between himself and William Dawson, under which certain activities of the Chicago Branch N.A.A.C.P. were to be discontinued by Jones and his administration in exchange for which Jones and his administration were to receive the support of Dawson and the Democratic Organization. Mr. Dawson was at that time Ward Committeeman of the Second Ward Regular Democratic Organization, and the publicly acknowledged leader of the third, fourth, and twentieth wards. Mr. Jones named as his administration's Chairman of the Legal Redress Committee of the Chicago Branch, and legal advisor to the president, George Leighton, who, on information and belief, was also connected to the Democratic Organization in that he had been president of the Third Ward Regular Democratic Organization, and continued to be active in the Chicago Democratic Organization.

Mr. Kennon continues with a recital of what happened within the NAACP in Chicago after Mr. Jones' election. He avers that "[t]he process of withdrawal of support by the Jones administration, which included George Leighton as legal counsel, resulted in a number of challenges being

made from time to time in N.A.A.C.P. meetings to the legality and propriety of actions taken by the Jones administration. These challenges were often referred to and decided in those meetings by George Leighton, whose opinions consistently favored whatever position had been taken by Mr. Jones." The affidavit continues to recite the disagreements, the philosophical differences that emerged in the administration of the Chicago Branch, NAACP during Mr. Jones' terms as president in 1957 and 1958. Mr. Kennon concludes his affidavit with the assertion that "I, and many others who were active in the Chicago Branch N.A.A.C.P. and its units during 1957-1959, seriously dispute the credibility of Theodore Jones and those in power during his administration as persons seriously concerned with furthering the interests of black people."

Mr. Timuel D. Black states in his affidavit that he had read all Mr. Kennon had said "and would testify to substantially the same effect if I were called as a witness in the case." He then asserts that he also attended the fall 1957 meeting of the Chicago Branch at which Mr. Jones was elected president. He says that precinct workers and captains of Mr. Dawson's political organization were present; these were people who "at that time publicly acknowledged to be under the leadership of William Dawson [sic]." Then he says that:

> I was one of several persons who sought, while Theodore Jones was president and George Leighton was Legal Redress Committee Chairman of the Chicago Branch N.A.A.C.P. to have the organization fulfill one of its traditional roles by moving legally against the city of Chicago and the Chicago Board of Education to remedy discrimination against blacks. In particular, in 1957 and 1958 we sought, in the wake of the decision of the United States Supreme Court in *Brown* v. *Board of Education*, to have the N.A.A.C.P. Legal Redress Committee seek the cessation of segregation in the Chicago public schools. We were rebuffed by Mr. Leighton and Mr. Jones. I and others

also sought in 1957 and 1958 to have the N.A.A.C.P and the Legal Redress Committee press the city of Chicago legally on the issue of housing segregation. Again, we were refused by Mr. Leighton and Mr. Jones.

The events surrounding the election of Mr. Jones in 1957 and, with respect to matters involving any challenge to city government and/or the Democratic Party, the subsequent inaction of the N.A.A.C.P. and its Legal Redress Committee, were the results of a deal whereby the Chicago Branch N.A.A.C.P. became a captive of the Democratic Party. The actions taken by Theodore Jones and George Leighton during 1957, 1958 and 1959 pitted the leadership of the Organization against its members, and were opposed to the interests of black people and the Organization itself. On the basis of the events known to me, neither of those individuals possesses any credibility as a spokesman for the interests of black people. Mr. Jones' actions as a member of the board of commissioners of the Chicago Park District, which I have observed, are consistent with the actions and positions taken by him in 1957-59 in the N.A.A.C.P., where, as with the Park District, he and George Leighton served the interests of the Cook County Democratic Party.

It is readily noticed that neither Ms. Renee Bradford nor anything this court has done or said about her is mentioned in any of these four affidavits. None of these affiants make any direct reference to this suit or its issues. None of these affidavits refer to, allege, describe, or aver any fact which shows that this court has a personal bias or prejudice against Ms. Bradford or in favor of the defendants, or any of them. Apparently, Ms. Bradford, or some lawyer on her behalf, believes that when this case is heard on the merits, the issues will be resolved, and the controversy decided, solely on Mr. Jones' testimony. This will not be so; and certainly, despite what this court has

said about Mr. Jones, no reasonable person will take those words to mean that he will be believed without regard to other evidence in the case.

One thing, however, is clear; none of these affiants hold Mr. Jones in high regard. And certainly, two of them, Messrs. Kennon and Black, do not think much of this judge's civil rights contributions to the Negroes of Chicago. But of what relevancy to the issues raised by Ms. Bradford's recusal motion is this review of Mr. Jones' Chicago Branch presidency, and of this judge's record as a civil rights lawyer?

An affidavit filed in support of a motion to recuse a judge under Section 144 is not a mechanism by which his civic accomplishments are appraised either for acclaim or condemnation. It is the means, provided by law, for a showing, with particularity, that the federal judge has a personal bias or prejudice either against the movant or in favor of any adverse party. See *United States* v. *Taylor,* 569 F.2d 448, 450 (7th Cir. 1978); cf. *International Business Machines Corp.,* 475 F.Supp. 1372, 1379-1381 (S.D. N.Y. 1979); Annot. 23 ALR Fed. 637. These four affidavits do not perform this important statutory function. *United States* v. *Ming,* 446 F.2d 1000, 1004 (7th Cir. 1972); *Peacock Records, Inc.* v. *Checker Records, Inc.,* 430 F.2d 85 (7th Cir. 1970). Consequently, even if Ms. Bradford could have incorporated them by reference into what she filed in support of the motion to recuse this court, her affidavit would not have qualified under Section 144, Title 28, United States Code. For these reasons, the court is compelled to conclude that the affidavits filed in support of the motion to disqualify pursuant to 28 U.S.C. §144 are not legally sufficient.

D

The affidavits with which Ms. Bradford supports her Section 455(a) motion are the same ones she filed in support of the motion under Section 144. Section 455(a) provides that "[a]ny justice, judge, or magistrate of the

United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This statute has been construed by many courts; and it has been the subject of comments by scholars. See, *e.q., Blizard* v. *Frechette,* 601 F.2d 1217 (1st Cir. 1979); *SCA Services, Inc.* v. *Morgan,* 557 F.2d 110 (7th Cir. 1977); *United States* v. *International Business Machines,* 475 F.Supp. 1372 (S.D. N.Y. 1979); Wright, Miller & Cooper, Federal Practice & Procedure, §3549; Comment, *The Elusive Appearance of Propriety: Judicial Disqualification under Section 455,* 25 DePaul L. Rev. 104 (1975); Comment, *Disqualification of Federal Judges for Bias Under 28 U.S.C. §144 and Revised §455,* 45 Fordham L. Rev. 139 (1976); note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. §455,* 178 U. of Ill. L. F. 863 (1978).

The concern under Section 455(a) is with the appearance of impartiality rather than the fact of bias or prejudice because, as one court has said, "[the] appearance of impartiality is virtually as important as the fact of impartiality." *Bell* v. *Chandler,* 569 F.2d 556, 560 (10th Cir. 1978). Accordingly, the test of recusal under this section is whether a reasonable person, knowing all of the circumstances, might reasonably question the judge's impartiality. *Smith* v. *Pepsico, Inc.,* 434 F.Supp. 424, 425 (S.D. Fla. 1977); Annot. 40 A.L.R. Fed. 954, 959. This being so, a court considering the sufficiency of a recusal affidavit is not limited to the facts which it discloses; all evidence of the alleged bias or prejudice should be considered. *Matter of Searches Conducted on March 5, 1980,* 497 F.Supp. 1283, 1291 (E. D. Wisc. 1980). Both case law and legislative history of Section 455(a) establish that "[t]he basis for a disqualification for lack of impartiality must be reasonable. *S. J. Groves & Sons* v. *Intern. Bro. of Teamsters,* 581 F.2d 1241,, 1248 (7th Cir. 1978); H. Rep. No. 93-1453, 1974 U.S.Code Cong. & Admin. News, pp.6351, 6355. And, as in the case of a Section 144 motion, the determination should be made on the basis of conduct extra-

judicial in nature, as distinguished from conduct within a judicial context. *Davis* v. *Board of School Com'rs of Mobile County,* 517 F.2d 1044, 1052 (5th Cir. 1975).

Among the circumstances which are not disclosed in any of the affidavits is the fact that on more than one occasion, in open court, this judge made it clear to the parties that his only reason for wanting to hear from Mr. Theodore Jones was to learn what, as a park district commissioner, he knew of Chicago Park District policies with regard to the factor of race in the application of park resources. This judge emphasized his desire, and the need for evidentiary assistance in resolving the factual and legal issues presented by the motion for preliminary injunction. It is true, as shown by the Dickerson, Rich, Kennon and Black affidavits that this judge knew of, and participated in some of Mr. Jones' civic activities in the Chicago Branch, NAACP; but it was only in the course of these judicial proceedings that this judge had the opportunity to learn what Mr. Jones knew about the principal defendant in this case, the Chicago Park District. At no time did this judge, as did the district judge in *Roberts* v. *Bailar,* 625 F.2d 125, 127 (6th Cir. 1980), prejudge the testimony of Mr. Jones.

It is generally said that the bias or prejudice alleged in an affidavit to recuse must have its basis in something other than what the judge learned from his participation in the pending case; and merely showing that he has issued adverse rulings, taken adverse actions, or made unfavorable statements during the course of the litigation, is insufficient *Resident Advisory Board* v. *Rizzo,* 510 F.Supp. 793, 796 (E.D. Pa. 1981); 48 C.J.S. Judges 143. This being so, it is obvious that there is no appearance of partiality on the part of this judge from the fact, as stated by the four affiants, that more than two decades ago he worked with Mr. Jones in the civil rights activities of the Chicago Branch, NAACP; and that in these proceedings, this judge learned of, and commented upon,

Mr. Jones' activities between 1976 and 1979 as a Chicago Park District Commissioner. No reasonable person would think otherwise. Therefore, this court must conclude that these same affidavits are also legally insufficient to support Ms. Bradford's motion to recuse under 28 U.S.C. §455(a). Accordingly, an appropriate order will be entered denying the motion to transfer these disqualification motions to another judge of this court for hearing, and denying the motions to recuse under 28 U.S.C. §144 and 455(a).

So ordered,

/s/ George N. Leighton
George N. Leighton
United States District Judge

Dated: January 7, 1983

No. 85-1356

Supreme Court, U.S.
FILED
MAR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SILAS J. ALEXANDER, et al.,

Petitioners,

v.

CHICAGO PARK DISTRICT, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the affirmance of the denial of motions to disqualify the trial judge, because of his alleged civic association with one of the defendants over 25 years ago, was an abuse of discretion which merits the review of this Court.

PARTIES BEFORE THE COURT OF APPEALS

The Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh, all respondents herein, and William A. Lee, now deceased, were named as appellees before the court of appeals.

The appellants below were Silas J. Alexander and others,[1] petitioners herein.

---

[1] The other petitioners who were named-plaintiffs before the district court are Karen Turner, Renee Bradford, Lillian Schrean, Joel Alexander, Earline Oglesby, Martha McGee, Althea Tucker, Rosemary Garrett, Latoski McCarthy Dillon, Beverly Gray, Anthony Gray, Arlene Gaston, Willie Gaston, Angel Gomez, Juan Gomez, Luis Diaz, Luis Flores, Comite Latino, Clara Evans, Christopher Delano Barnett, Oscar Wells, Terry Lee Fischer, Agnes Bernaugh, William Hall, Charles Adkins and Natalie Lyle.

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IN THE

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OCTOBER TERM, 1985

No. 85-1356

SILAS J. ALEXANDER, et al.,

Petitioners,

v.

CHICAGO PARK DISTRICT, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh respectfully pray that a writ of certiorari not issue to review a portion of the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 773 F.2d 850. (App. 1). A prior interlocutory appeal to the court of appeals is reported at 709 F.2d 463 (App. 2) and a pretrial ruling of the district court is reported at 548 F.Supp. 277.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1985. The court of appeals denied a timely petition for rehearing by order entered on November 13, 1985. The petition for certiorari was not filed within ninety (90) days of the denial of rehearing and respondents challenge the Court's jurisdiction under 28 U.S.C. § 1254(1) as alleged by petitioners.[2] In any event, this brief has been filed within thirty (30) days of the receipt of the petition on February 12, 1986.

STATUTES AND CIRCUIT RULE INVOLVED IN THE CASE

28 U.S.C. § 144 provides in pertinent part:

> "Bias or prejudice of judge
>
> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

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[2] Respondents refer to a "Motion and Application to Individual Justice in accordance with Rule 43 of the Rules of the Supreme Court" filed on or about February 28, 1986 by petitioners which reflects facts demonstrating an untimely filing of the petition. On March 10, 1986 respondents were informed by the Clerk of the Court that the Court intends to treat the instant petition as a cross-petition to a timely filed petition for writ of certiorari filed on February 11, 1986 by respondents.

28 U.S.C. § 455(a) provides in pertinent part:

> "Disqualification of justice, judge, or magistrate
>
> "a. Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

7th Circuit Rule 18 provides:

> "CIRCUIT RULE 18. Reassignment of Remanded Cases
>
> "Whenever a case tried in a district court is remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case. In appeals which are not subject to this rule by its terms, this court may nevertheless direct in its opinion or order that this rule shall apply on remand."

STATEMENT OF THE CASE

The statement presented by petitioners is argumentative and incomplete. The respondents must, therefore, set forth this statement of the case.

I. THE PARTIES

A. Respondents

The Chicago Park District was created by Illinois law in 1933 (Ill.Rev.Stat. ch. 105, § 333.1) and supports itself from public funds. It is responsible for a myriad of functions within the City of Chicago including the operation of zoos, parking garages, harbors and parks, playgrounds and playlots. The Chicago Park District is governed by a Board of Commissioners who serve without compensation. Respondents O'Malley,

Jones, Foran, Marovitz, McGowan, Simon, Bartholomay and McHugh are past or present members of the Board of Commissioners. Respondent Kelly has been the General Superintendent of the Chicago Park District and has been responsible for its day-to-day management.

B. The Petitioners

The Petitioners have been certified as a class consisting of all black and Hispanic residents of the City of Chicago who allegedly have been injured by the acts of the respondents. The class purports to be represented by 27 named-plaintiffs.

II. PETITIONERS' COMPLAINTS

The class-wide allegations of the petitioners ("Alexander") were filed on June 29, 1979. Alexander made several amendments to his complaint, ultimately asserting under 42 U.S.C. section 1983 four counts against the respondents ("Park District") in his third amended complaint. Count I alleged that the Park District discriminated against Alexander with respect to the distribution of park funds and other resources. Counts II and III alleged discrimination in employment and Count IV claimed personal injuries, all of which allegedly arose out of the discriminatory allocation of resources submitted under Count I.

In 1979, a similar case, *Midwest Community Council, Inc. v. Chicago Park District*, 79 C 3187 (N.D. Ill., Sept. 16, 1983), was filed by a different group of plaintiffs. It also was a class action suit brought on behalf of black residents of certain wards of the City of Chicago. The allegations of the *Midwest* complaint focused solely on the allocation of resources issue, claiming that the particular wards inhabited by the class members were afforded less recreational resources and funds than other wards in the City of Chicago.

III. ALEXANDER'S MOTION FOR PRELIMINARY INJUNCTION

On December 2, 1981 Alexander filed a motion for preliminary injunction seeking to prohibit the Park District from implementing its 1982 budget because of the alleged acts of racial discrimination reflected by the Alexander complaint. The motion incorporated a "Report on a Survey of Parks, Personnel, Facilities and Conditions in the City of Chicago", which was dated November 13, 1981 and authored by David Koehler. The report did not mention the Park District budget, but purported to summarize and analyze the results of a "survey" of the condition of 57 Chicago parks conducted from August 27, 1981 to September 5, 1981. Alexander claimed that the survey report established the racial discrimination alleged in his complaint and that an injunction against the implementation of the Park District budget was necessary to prevent further discriminatory conduct.

In respect to the preliminary injunction motion, the trial court heard testimony of several witnesses, lay and expert, tendered by the parties. Alexander submitted the testimony of David Koehler, two of the surveyors, Brian Fogel and Manford Holmes, and Lavern Kron, an alleged budget expert. The Park District presented the testimony of: Terrence Barella, the Director of the Department of Budget Management of the Park District, who testified as to the manner in which the budget was prepared and implemented; Jerome McKinney, the Director of Safety of the Park District, who told of the conditions and safety measures employed in the various parks; Alvin Bielak, an Assistant Supervisor of the Repair and Construction Department of the Park District, who testified as to repair procedures followed in the parks; Dr. Kenneth Mladenka, a professor at Texas A&M University specializing in the analysis of urban services, who was of the opinion that the racial composition of wards in the City of Chicago had not been the determining

factor in the allocation of park resources; and Commissioner Marovitz, who testified as to the lack of any racial considerations in formulating the Park District budget. The court also received documentary evidence from each of the parties.

Additionally, the district court received the deposition testimony of Commissioner Iola McGowan who testified as to her views on the Park District budget. The court also heard from Theodore Jones who was called as a court's witness, and who testified as to his experiences while serving on the Board of Commissioners.

On September 30, 1982 the trial court denied the motion for preliminary injunction and issued findings of fact and conclusions of law. (App. 3). The 81 separate findings of fact and 9 conclusions of law focused on the park survey, and its lack of credibility, and the Park District's evidence, which the court found to be credible. Among other things, the court found that: David Koehler had been a friend of Rufus Cook, Alexander's attorney, since 1958 and was inexperienced in the analysis of parks; a law clerk of Rufus Cook, Judith Richardson, and not Koehler, selected the survey team and coordinated their activities[3]; the surveyors lacked sufficient training; and their standards in judging parks did not remain constant throughout the survey.

As to McGowan and Jones, the court's findings and conclusions were limited to the following:

> "80. There is evidence in the record consisting of the deposition testimony of Commissioner Iola McGowan who testified concerning her twelve point plan for upgrading

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[3] The survey team was to be composed of four disinterested individuals randomly selected from colleges of Chicago, Illinois. It was disclosed that one of the persons chosen to be a surveyor was the wife of Donald Kelly, a photographic consultant and trial assistant to Rufus Cook. Also, subsequent to the survey, Judith Richardson became an attorney employed with Cook and assigned to the instant case.

the parks. Her twelve point program was not addressed to discrimination. She also gave her views on the problems which would be encountered with a per park budget." (App. 3).

"81. Theodore Jones was called as the court's witness. During his tenure as a commissioner, Mr. Jones attended most meetings of the Park District Board. He is personally familiar with several parks. With respect to personnel, he initiated and won approval of an affirmative action employment program. He testified concerning the responsiveness of the Park District to his suggestions which included capital improvements at the South Shore Country Club and Jackson Park, a golf driving range on the south side, funding for the DuSable Museum of African-American history and work at the 31st Street beach." (App. 3).

"7. From the evidence this court has heard, applying the test of credibility and weighing all of it carefully, it does not appear that plaintiffs have at least a reasonable likelihood of success on the merits at trial. The park survey which plaintiffs' lawyer obtained is not credible evidence; it is not probative; it does not show that plaintiffs are likely to recover in this case. This court found it necessary to call as its witness, Mr. Theodore Jones, a member of the Negro race, a civic leader in the Negro community of Chicago, a former president of the Chicago branch, National Association for the Advancement of Colored People. Mr. Jones was neither deposed nor interviewed by the plaintiffs prior to the hearing for the motion for preliminary injunction. This court concludes in evaluating Mr. Jones' testimony that he would have disclosed, as candidly as he testified, any basis that would support the plaintiffs in this case. He did not. Taking his testimony, together with all of the other evidence this court has heard, this court is satisfied that there is very little likelihood of plaintiff succeeding on the merits at trial in this case." (App. 3).

Alexander appealed the denial of the preliminary injunction motion to the Seventh Circuit Court of Appeals. In

affirming the decision of the district court, the Seventh Circuit criticized the survey:

> "The survey was designed and directed *in absentia* by a political scientist who had no previous experience in the evaluation of park systems and who had no direct contact with those who conducted the survey; the training of the equally inexperienced surveyors was perfunctory and brief; the site visits were hastily conducted over one of the busiest periods of the year; the survey itself consisted of fluid, undefined criteria which not only elicited a single response from two surveyors but also invited substantial shifts in the surveyors' relative evaluation framework and even the *post-hoc* amendment of answers as well as bias from discussions with other surveyors and from the appearance of the surrounding communities; . . .". 709 F.2d at 468 (App. 2).

IV. ALEXANDER'S MOTIONS FOR DISQUALIFICATION OF JUDGE LEIGHTON

On November 12, 1982, Alexander filed motions for the disqualification of the trial judge, the Honorable George N. Leighton, under 28 U.S.C. sections 144 and 455(a). (App. 4). The motions were filed only a few weeks after the district court denied Alexander's motion for preliminary injunction. Only one of the Alexander plaintiffs, Renee Bradford, submitted the motions for disqualification. Her section 144 motion stated that Judge Leighton had a personal bias or prejudice against her, or a bias in favor of the Park District. The section 455(a) motion alleged that the impartiality of Judge Leighton might reasonably be questioned.

The motions for disqualification alleged that the in-court remarks of Judge Leighton during the hearing on the preliminary injunction motion and the findings of fact and conclusions of law demonstrated that the court was persuaded to its decision by the testimony of Jones and McGowan. Alexander contended that the credibility of Jones and McGowan was "enhanced" in the eyes of the court because of their association with the Chicago branch of the National Association for the

Advancement of Colored People ("NAACP"). Alexander stated that there was no basis for the enhanced credibility because, in his view, Jones harmed the Chicago branch of the NAACP. No similar allegation was made against McGowan.

The affidavits submitted by Renee Bradford in support of the motions were based on information and belief and incorporated by reference the affidavits of Earl B. Dickerson, Faith Rich, Lawrence Kennon and Timuel Black, none of whom was a named-plaintiff. The Dickerson affidavit focused on an alleged conversation in 1957 between the affiant and Theodore Jones. The subject of the alleged conversation was whether Jones would be interested in serving as president of the Chicago branch of the NAACP. According to Dickerson, before Jones made a decision on whether he should seek the presidency, he first telephoned Congressman William L. Dawson, then Democratic Committeeman of the Second Ward in Chicago, and obtained his support. The remainder of the affidavit of Dickerson relates his alleged observations when he attended the branch election and supposedly saw a number of persons from Mr. Dawson's Second Ward organization who were present and voting and who had not been known to Dickerson to be members of the NAACP.

In her affidavit, Rich described her efforts, prior to 1957, in working with the Chicago branch of the NAACP in matters relating to education. She claimed that, prior to the election of Jones as president of the Chicago branch, she and her supporters were prepared to negotiate with members of the Chicago Board of Education on the subject of *de facto* segregation in Chicago public schools. She stated that once Jones was elected, the Chicago branch withdrew its support from that activity.

Kennon's affidavit referred to the time period prior to 1958 and to the alleged activities of himself and others on behalf of the Chicago branch of the NAACP in pursuing civil rights matters in Chicago. He referred to efforts relating to a number of institutions in Chicago including the Park District. He

claimed that there were demonstrations and protests in the summer of 1958 against the Park District which were allegedly triggered by the beatings of several blacks who had sought to use the Park District facilities at Rainbow Beach in Chicago. Kennon believed at that time that the Park District was maintaining racially segregated facilities and failing to provide protection to black persons seeking to use facilities used by whites.

Kennon's affidavit also related his version of Jones' election to the presidency of the NAACP—Chicago branch in the late fall, 1957 and stated that:

> "Mr. Jones' election, on information and belief, was made possible by an agreement made between himself and William Dawson, under which certain activities of the Chicago Branch—NAACP were to be discontinued by Jones in his administration in exchange for which Jones and his administration were to receive the support of Dawson and the Democratic organization. Mr. Dawson was at that time Ward Committeeman of the Second Ward Regular Democratic Organization, and the publicly acknowledged leader of the Third, Fourth, and Twentieth Wards. Mr. Jones named as his administration chairman of the Legal Redress Committee of the Chicago Branch, and legal advisor to the president, George Leighton, who, on information and belief, was also connected to the Democratic organization in that he had been president of the Third Ward, Regular Democratic Organization, and continued to be active in the Chicago Democratic organization." (App. 4).

Kennon claimed that there were a number of challenges made at NAACP meetings as to the legality and propriety of actions taken under the Jones administration, with George Leighton consistently favoring whatever position had been taken by Jones. The Kennon affidavit concluded with the assertion that "I, and many others who were active in the Chicago Branch NAACP and its units during 1957-1959,

seriously dispute the credibility of Theodore Jones and those in power during his administration as persons seriously concerned with furthering the interests of black people." (App. 4).

The final affidavit incorporated into the Bradford affidavit and motion was that of Timuel D. Black. Black stated that he had read all of what Mr. Kennon had said "and would testify to substantially the same effect if I were called as a witness in this case." (App. 4). He also related his alleged observations concerning the fall 1957 meeting of the Chicago Branch at which Jones was elected president.

Black told of his alleged involvement in activities of the NAACP during Jones' service as president and George Leighton's tenure as Chairman of the Legal Redress Committee. Black stated that he favored various legal actions against the City of Chicago and particularly the Chicago Board of Education on civil rights issues. Black also said that:

> "The actions taken by Theodore Jones and George Leighton during 1957, 1958 and 1959 pitted the leadership of the organization against its members, and were opposed to the interests of black people and the organization itself. On the basis of the events known to me, neither of those individuals possesses any credibility as a spokesman for the interests of black people. Mr. Jones' actions as a member of the Board of Commissioners of the Chicago Park District, which I have observed, are consistent with the actions and positions taken by him in 1957-59 in the NAACP where, as with the Park District, he and George Leighton served the interests of the Cook County Democratic Party." (App. 4).

V. THE DENIAL OF THE MOTIONS FOR DISQUALIFICATION

On January 7, 1983, Judge Leighton issued a thirty-eight page opinion which denied the motions for disqualification. (App. 5). Alexander filed with the Seventh Circuit a petition

for a writ of mandamus and a motion for a stay of proceedings. The petition and motion were denied on February 8, 1983 and that denial was affirmed on April 4, 1983 in respect to Alexander's petition for an *en banc* rehearing on the petition for writ of mandamus.

VI. THE TRIAL PROCEEDINGS

In May, 1983, Count I of Alexander's third amended complaint, was litigated before a jury[4] in a trial which exceeded three months. Counts II, III and IV were severed for consideration at a later time. Tried at the same time were all claims in the companion case of *Midwest Community Council, Inc. v. Chicago Park District*, 79 C 3187 (N.D. Ill., Sept. 16, 1983). On August 17, 1983, the jury returned a verdict in favor of all defendants and against all plaintiffs and judgment in *Alexander* was entered.[5] Subsequently the court entered judgment in favor of the Park District in *Midwest* and incorporated its own findings of fact and conclusions of law.[6]

On August 29, 1983, Alexander filed a motion pursuant to Federal Rule of Civil Procedure 59 for the entry of an order

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[4] In his brief, Alexander states that no blacks were represented in the jury because of the racial composition of the venire and the Park District's exercise of peremptory challenges. (Alexander Pet., p. 7, n. 3). Alexander fails to tell the Court that the jury included an Hispanic-surnamed individual who was a resident of Chicago (one of Alexander's class members). The remainder of the jury was composed of persons residing outside of the City of Chicago. As to the use of peremptory challenges, Alexander fails to tell the Court that it exercised each of its six peremptory challenges against white persons. Of the six peremptory challenges available to defendants, five were used against blacks and one was used against a white person. Alexander also fails to advise the Court that he never pursued a motion regarding the racial composition of the jury.

[5] Prior to the close of the trial, Alexander moved for a voluntary dismissal of Jones and McGowan and that motion was granted.

[6] The jury was hearing the *Midwest* case in an advisory capacity pursuant to earlier rulings of the trial court.

amending the judgment or granting a new trial. On September 23, 1983, the trial court denied the motion. On that same date the court entered an order disposing of Count IV of the third amended complaint on a summary judgment and dismissing Counts II and III under Federal Rule of Civil Procedure 54(b) so as to allow the parties to take appeal from all orders previously entered in the case.

Alexander did not pursue an appeal, but instead filed a fourth amended complaint. The complaint pled a number of issues, including the claim that the Park District discriminated in its resource allocations. The Park District moved to dismiss the complaint and that motion was granted on October 18, 1984. Alexander appealed to the Seventh Circuit and presented, among other issues, the question of whether the trial court had abused its discretion in denying the motions for disqualification. Although the Seventh Circuit reversed and remanded a portion of the case which dealt with employment discrimination claims, it affirmed the remainder of the district court's ruling, including the decision on the disqualification motions. (App. 1).

REASONS FOR NOT GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S DECISION WAS PROPER AND DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE SIXTH CIRCUIT, OR WITH THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

A. THE DECISION OF THE TRIAL COURT, AS APPROVED BY THE SEVENTH CIRCUIT, WAS NOT AN ABUSE OF DISCRETION, BUT RATHER, AN APPROPRIATE DISPOSITION OF FRIVOLOUS MOTIONS DESIGNED TO SAMPLE THE TEMPER OF THE COURT

1. Introduction

It is well settled that the review of a trial court's denial of a disqualification motion is limited to the issue of whether there was an abuse of discretion. *E.g., Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). In the instant case, it is readily apparent that there was no abuse of discretion.

The disqualification motions were based on affidavits which supply rumor, gossip and speculation in the place of fact. At most, the affidavits underscore political and philosophical differences between the affiants and Jones and Judge Leighton with respect to the activities of the NAACP—Chicago Branch over 25 years ago. The relevancy of the motions was aptly questioned by the trial court:

> "One thing, however, is clear: None of these affiants hold Mr. Jones in high regard. And certainly, two of them, Messrs. Kennon and Black, do not think much of this Judge's civil rights contributions to the Negroes of Chicago. But of what relevancy to the issues raised by Mr. Bradford's recusal motion is this review of Mr. Jones' Chicago Branch presidency, and of this Judge's record as a civil rights lawyer?" (App. 5).

The thrust of Alexander's argument to this Court is that the recusal should have been allowed because Judge Leighton "participated pervasively and profoundly in the precise activities [of the NAACP—Chicago Branch] which . . . provide the basis for attacking defendants' credibility." (Alexander Pet., p. 12). Alexander intimates that recusal was necessary prior to the trial on the merits of the case in order to allow him to launch his credibility attack.

What Alexander does not explain is how the alleged 1957-1959 NAACP activities of Jones and Judge Leighton could provide relevant evidence on the issue of Park District resource allocations presented by the preliminary injunction motion or the Alexander complaint. Nor does Alexander tell this Court that during the trial which occurred in 1983, he *voluntarily* moved for the dismissal of Jones and McGowan as to the claims of racial discrimination then pending and that the motion was granted. Alexander took that action because he knew he lacked any evidence against Jones and McGowan. Had Alexander truly believed that Jones was committed to the "disenfranchisement of blacks" (Alexander Pet., p. 13), would he have voluntarily moved for Jones' dismissal? Alexander's current position against Jones, and derivatively Judge Leighton, is being pursued in bad faith and for the sole purpose of manufacturing an argument to this Court on his petition for writ of certiorari.

2. The Trial Court's Denial Of The Preliminary Injunction Motion Was Not Improperly Influenced By Jones' Testimony

Alexander believes that the trial court based its denial of the preliminary injunction motion on the testimony of Jones and, that therefore the allegations which have been made against Jones are especially significant. Alexander ignores the record which discloses that the trial judge relied on a wealth of evidence in rejecting the injunction motion.

The preliminary injunction hearing covered nine days. Each side presented many witnesses, lay and expert, together with hundreds of pages of exhibits and charts. Well over a hundred photographs were admitted into evidence.

Alexander's sole support for the injunction motion was a "survey" which suggested that there were disparities in the cleanliness and maintenance of the parks along racial lines. The survey was authored by David Koehler, a long-time friend of Alexander's counsel. The actual survey was performed by four surveyors who supposedly were randomly picked by the survey coordinator, a woman who at the time was a law clerk for Alexander's counsel and who later became an attorney and was assigned to this case. One of the "randomly" picked surveyors was the wife of a photographic consultant to Alexander's attorney. That consultant testified at trial on behalf of Alexander and assisted Alexander's counsel through much of the trial proceedings.

The survey was found by the trial court and the Seventh Circuit to lack any credibility and that fact, coupled with the expert testimony and other evidence produced by the Park District, resulted in the denial of the preliminary injunction motion. There was ample basis for that decision, even without the testimony of Jones.

The trial court's findings of fact and conclusions of law on the preliminary injunction motion do not support the view that the credibility of Jones was heightened to a level which produced a disqualifying prejudice. The statements of Judge Leighton on Jones merely reflect the background of a witness and the findings of fact and conclusions of law, read as a whole, decided the issues in a precise fashion.

Alexander's disqualification motions attempted to "sample the temper" of the trial court. (App. 5). The trial court did not abuse its discretion in dismissing the frivolous disqualification motions which Alexander filed a few weeks after his prelimi-

nary injunction motion was denied and while the taste of sour grapes was still in his mouth.

B. THE DECISION BELOW IS NOT IN CONFLICT WITH SUPREME COURT OR FEDERAL CIRCUIT LAW AND DOES NOT CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWERS

This Court has granted writs of certiorari only in cases involving principles "of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals". *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Alexander has not met that burden in the instant petition.

A section 144 motion for disqualification is proper only where there is "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger v. United States*, 255 U.S. 22, 33 (1921). As to affidavits in support of the motion, the trial court aptly observed that:

> "An affidavit filed in support of a motion to recuse a judge under Section 144 is not a mechanism by which his civic accomplishments are appraised either for acclaim or condemnation. It is the means, provided by law, for a showing, with particularity, that the federal judge has a personal bias or prejudice either against the movant or in favor of any adverse party. *See United States v. Taylor*, 569 F.2d 448, 450 (7th Cir. 1979); *cf. United States v. International Business Machines Corp.*, 475 F.Supp. 1372, 1379-1381 (S.D.N.Y. 1979) . . .". (App. 5).

As to 28 U.S.C. section 455, a trial judge should disqualify himself:

> "only if the facts provided what an objective, knowledgeable member of the public would find to be a *reasonable basis* for doubting the judge's impartiality. Were less required, a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid

> adverse decisions by alleging the slightest of factual bases for bias. . . . This restricted mandate to disqualify is calculated to induce a judge to tread the narrow path between timidity and tenacity."
>
> *M.K. Metals, Inc. v. National Steel Corp.*, 593 F.Supp. 991, 994 (N.D. Ill. 1984), *quoting In re United States*, 666 F.2d 690, 695 (1st Cir. 1981) (emphasis in original).

The sufficiency of affidavits filed in support of disqualification motions has been subject to strict scrutiny. A noteworthy case is *Hodgson v. Liquor Salesmen's Union Local No. 2*, 444 F.2d 1344 (2d Cir. 1971). That suit, brought under 29 U.S.C. section 482, challenged the election of officers of defendant, a labor union. Shortly prior to trial, the Union presented the trial judge with a disqualification motion which was supported by the affidavit of its president which, in turn, was based on the affidavit of another person. The thrust of the affidavits was that plaintiff's attorney had been overheard speaking to a group of dissident union personnel, stating that he was "very close" to the trial judge.

The trial court denied the motion and that denial was affirmed by the Second Circuit, which stated the following as to the sufficiency of supporting affidavits:

> "However, the trial judge must at the outset determine whether the facts so stated would constitute legally sufficient grounds for recusal, (citations omitted), and if the affidavit is insufficient, he is under just as much a duty to deny the application as he would be to recuse himself if it were sufficient. (Citations omitted). Mere conclusions, opinions, rumor or vague gossip are insufficient. (Citations omitted). To be sufficient the affidavit must set forth facts, including the time, place, persons and circumstances, and, where based upon an extra-judicial statement of the judge, the substance of that statement. (Citations omitted)." 444 F.2d at 1348.

The relationship between trial judges and parties has also been a subject of review by the courts. In *Weiss v. Hunna*, 312

F.2d 711 (2d Cir. 1963), the court focused on a section 455 motion which alleged the judge's common membership with defendant in certain international legal associations and attendance at one or more of their meetings. The court noted that "professional relationships of this sort do not reach the level where considerations of disqualification arise." *Id.* at 714.

Another analogous case decided under sections 144 and 455 is *Warner v. Global Natural Resources plc*, 545 F.Supp. 1298, 1301-03 (S.D. Ohio 1982). In that case, the acquaintanceship between plaintiff and the judge and the fact that the plaintiff had supported the judge's nomination to the bench were rejected as reasons for disqualification. Similarly in *Bumpus v. Uniroyal Tire Co.*, 385 F.Supp. 711, 714 (E.D. Penn. 1974), the court denied a motion for disqualification under section 144 based on the fact that the judge had been a law partner of one of the attorneys more than a decade prior to the action. *See also, In re United States*, 666 F.2d 690, 697 (1st Cir. 1981).

Given this legal background, it is clear that the affidavits which Alexander has provided are grossly insufficient. The Renee Bradford affidavits do not set forth any facts which demonstrate any prejudice against her, but instead rely upon other affidavits. The Dickerson, Rich, Kennon and Black affidavits focus on the activities of the NAACP—Chicago Branch in or about 1957. The affidavits are replete with conclusory allegations, rumors and gossip regarding the NAACP—Chicago Branch, Jones and Judge Leighton.[7]

The Dickerson affidavit relates the association of the affiant with Jones and the speculation of Dickerson as to the circumstances behind Jones' election to the presidency of the NAACP—Chicago Branch. The Rich affidavit demonstrates differences in philosophy between her and Jones in connection with the NAACP. The same is basically true of the Kennon

[7] None of the affidavits mentions McGowan, the other respondent whose credibility was supposedly enhanced in the eyes of the court because of NAACP activities.

affidavit which expresses the opinion that Judge Leighton and Jones did not take sufficient action against the City of Chicago. The Black affidavit is similar. The affidavits should be treated for what they are—political rhetoric of a long past vintage.

Alexander's *sole* citation to a "conflicting" circuit opinion is *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980). A plain reading of *Roberts* distinguishes it from the case at bar. In that case the court, at a pretrial hearing, prejudged the lack of culpability of defendant Graves by stating: "I know Mr. Graves, and he is an honorable man and I know he would never intentionally discriminate against anybody". *Id.* at 127. At no time did Judge Leighton so prejudge the testimony of Jones or any other respondent.

Alexander's other cases are unpersuasive and inapposite. For instance the situation in *In re Murchison*, 349 U.S. 133, 137 (1955), where the court overturned orders of contempt issued by a judge who was sitting as a "one-man grand jury", is not comparable to the facts of the instant case. Moreover, *United States v. Conforte*, 457 F.Supp. 641 (D. Nev. 1978) and *United States v. Zagari*, 419 F.Supp. 494 (N.D. Cal. 1976) are cases which soundly rejected motions for disqualification under 28 U.S.C. sections 144 and 455. None of Alexander's cases supports the view that the past NAACP related activities of Jones and Judge Leighton require the disqualification of that judge with respect to the trial of a case over 25 years later.

II.

THE SEVENTH CIRCUIT DID NOT ERR UNDER CIRCUIT RULE 18 IN REFUSING TO REMAND THE CASE TO A DIFFERENT JUDGE

The appeal to the Seventh Circuit came as a result of the district court's granting of the motion to dismiss Alexander's fourth amended complaint. The Seventh Circuit was not reviewing the appeal of a trial and it has not remanded the case for a "new trial" within the meaning of Seventh Circuit Rule 18. Accordingly, that Rule is inapplicable and does not require a remand to a different judge. The Seventh Circuit has not abused its discretion under that Rule and their decision to return the case to Judge Leighton should not be reversed.

III.

CONCLUSION

For these reasons, the decision of the Seventh Circuit on the disqualification issue should stand. Alexander's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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MAR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SILAS J. ALEXANDER, et al.,

Petitioners,

v.

CHICAGO PARK DISTRICT, et al.,

Respondents.

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX 1

Silas J. ALEXANDER, et al.,
Plaintiffs-Appellants,

v.

CHICAGO PARK DISTRICT, et al.,
Defendants-Appellees.

No. 84-2995.

United States Court of Appeals,
Seventh Circuit.

Argued June 4, 1985.

Decided Sept. 19, 1985.

As Amended on Denial of Rehearing
Nov. 13, 1985.

Before CUMMINGS, Chief Judge, ESCHBACH, Circuit Judge, and WRIGHT, Senior Circuit Judge.*

EUGENE A. WRIGHT, Senior Circuit Judge.

This lengthy litigation alleging discrimination in resources allocation and employment by the Chicago Park District during the years 1970 through 1980 raises these issues:

1) Did the court err in dismissing three counts of the amended complaint under res judicata and collateral estoppel?

2) Did it err in dismissing the remaining three counts of the amended complaint for failure to state a cause of action under 42 U.S.C. § 1983?

3) Did it err in denying plaintiffs' recusal motions?

---

* The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

FACTS

The procedural sequence in this case is convoluted and will be simplified here to include only pertinent facts.

In 1979, Alexander filed a class action on behalf of all Black, Hispanic and poor Chicago residents alleging racial discrimination by the Chicago Park District and its attorneys, superintendent and past and present commissioners (collectively District). Personal liability is sought against the individual defendants.

In 1982, we affirmed the court's denial of plaintiffs' motion for a preliminary injunction to restrain the budgetary and fund allocation actions of the District. *Alexander v. Chicago Park District*, 709 F.2d 463 (7th Cir.1983). Plaintiffs then filed two unsuccessful motions to disqualify Judge Leighton and followed these with a mandamus petition which we denied on February 8, 1983. Alexander's petition for an en banc rehearing on this mandamus petition was denied on April 4, 1983.

In 1983, the district court denied plaintiffs' motion for class notification under FED.R.CIV.P 23(c)(2). It determined that class members would not be prejudiced because if the defendants prevailed, the class members without notice would not be bound.

Later in 1983, the district court consolidated this case with another class action, *Midwest Community Council, Inc. v. Chicago Park District (Midwest)*, No. 79 C 3187 (N.D.Ill. Sept. 16, 1983) (unpublished), which raised similar discriminatory recreational resources allocation claims against the District. The *Midwest* action sought only equitable relief.

In count I of the second amended complaint, plaintiffs alleged that defendants administered the Chicago Park District in a racially discriminatory manner, so that parks located in predominantly Black communities were allocated less park resources, including state and federal funds, resulting in injuries and disparities in equipment and services. This count was brought under 42 U.S.C. § 1983.

Relying on the Due Process and Equal Protection clauses of the United States and Illinois Constitutions and on § 1983, plaintiffs brought employment discrimination claims in counts II and III. Count II charged that a civil service examination administered by the Park Service was not (1) job-related (2) culturally, racially and sexually unbiased, and (3) objectively administered.

Count III dealt with hiring, assigning and promoting employees based on race and ethnicity. This count also alleged a variance in numbers of administrative, recreational, support and maintenance staff between parks in white and non-white communities. This in turn was alleged to have forced certain plaintiffs to resign from park employ because of limited job opportunities.

Count IV, brought under § 1983, alleges personal injuries to several plaintiffs resulting from these racially discriminatory practices. A fifth count was subsequently deleted.

The consolidated cases were tried in 1983. The court severed Alexander's employment discrimination and tort claims. During trial, Alexander filed a third amended complaint, similar to the second in the relevant allegations.

After a three-month trial, the jury returned a verdict for the defendants on the resources allocation claims and judgment was entered against plaintiffs on count I in the *Alexander* suit. Because the jury heard the *Midwest* claims in an advisory capacity only, the court subsequently entered judgment for the District, incorporating its own findings of fact and conclusions of law. No appeal was taken from the *Midwest* judgment.

Defendants moved for summary judgment contending that the jury verdict on count I was res judicata on all claims in counts II, III and IV. In an order dated September 23, 1983, the court granted summary judgment on count IV, reasoning that the underlying basis of the tort claim was discriminatory resources allocation causing dangerous conditions in black neighborhood parks. The court granted a partial summary

judgment on counts II and III to the extent that discrimination in resource allocation or administration would not be relitigated. It then dismissed counts II and III under FED.R.CIV.P. 54(b) to allow the parties to appeal.

Alexander did not appeal but filed an amended complaint as authorized in the September 23 order. Count I alleged that the District expended federal funds in a racially and ethnically discriminatory manner in violation of regulations of the Department of Housing and Urban Development and Department of Interior under 42 U.S.C. § 1983.

Count II sought an injunction, reinstatement, back pay and damages under Due Process and Equal Protection Clauses of the United States and Illinois Constitutions and under 42 U.S.C. § 1983. It challenged the civil service examination given by the District on November 1, 1977 for a physical instructor position.

Count III incorporated the allegations of count I that defendants allocated resources to the parks in a discriminatory manner and the allegations of count II concerning the civil service examination. It also was brought under 42 U.S.C. § 1983.

Count IV alleged that the District had a policy of allocating resources and employees on a discriminatory basis in violation of the Due Process and Equal Protection Clauses of the United States and Illinois Constitutions and 42 U.S.C. § 1983. It sought monetary relief for hiring, assignment and payment of personnel on a racially discriminatory basis.

Count V alleged that the District expended federal funds in a discriminatory manner and contrary to federal regulations, resulting in class members being forced to resign from the District's employ. Count VI alleged that the policy of expending federal funds in a discriminatory manner resulted in reduced maintenance, aid and inspections at minority parks, resulting in physical injuries to minority members.

The District moved to dismiss on the grounds of res judicata and that the complaint failed to state a claim under 42 U.S.C. § 1983. The court granted the motion on October 18, 1984, dismissing counts I, V and VI on res judicata grounds and counts II, III and IV for failure to state a claim.

ANALYSIS

Res Judicata

Res judicata is a doctrine of repose. "It's enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals." *Nevada v. United States*, 463 U.S. 110, 129, 103 S.Ct. 2906, 2918, 77 L.Ed.2d 509 (1983), quoting *Southern Pacific Railroad v. United States*, 168 U.S. 1, 49, 18 S.Ct. 18, 42 L.Ed. 355 (1897). *See also Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 469 (7th Cir.1982) (purpose is to reduce costs of litigation).

Under res judicata, or claim preclusion,[1] a prior judgment on the merits bars the same parties or their privies from

---

[1] Preclusion occurs under two theories: issue preclusion and claim preclusion. Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit on the merits between the same parties or their privies. Plaintiffs' claims are merged in the judgment for plaintiff while judgment for defendant acts to bar any further claims by plaintiff against that defendant. It is usually referred to as res judicata, and that is how we use it. *See Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, ____, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984).

Issue preclusion prevents relitigation of a matter of fact or law that was previously litigated and decided. *See Jones v. City of Alton*, 757 F.2d 878, 879 n. 1 (7th Cir.1985). It is usually referred to as collateral estoppel.

The trial court dealt with both issue and claim preclusion. Because of our decision on claim preclusion, we need not reach the collateral estoppel issue.

relitigating all issues which were raised and decided or could have been raised in the prior action. *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir.1981); *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir.1982). The doctrine applies in civil rights suits as well. *Lee*, 685 F.2d at 198-99; *Local 1006, A.F.S.C. M.E., AFL-CIO v. Wurf*, 558 F.Supp. 230, 233 (N.D.Ill.1982). *See also Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, —, 104 S.Ct. 892, 899, 79 L.Ed.2d 56 (1984) (state preclusion law applies in federal § 1983 suit brought subsequent to state suit).

In determining the preclusive effect on the six counts in the fourth amended complaint of the jury's verdict on count I and the summary judgment on count IV of the third amended complaint, the court analyzed the three threshold requirements of res judicata: (1) identity of parties; (2) identity of causes of action; and (3) a final judgment on the merits. *Lee*, 685 F.2d at 199. *See Nevada v. United States*, 463 U.S. 110, 129-30, 103 S.Ct. 2906, 2918, 77 L.Ed.2d 509 (1983); *Local 1006*, 558 F.Supp. at 234.

1. **Identity of Parties**

The court found that named plaintiffs in the fourth amended complaint were named also in the third amended complaint and so concerned itself only with the last two requirements. Twenty-seven plaintiffs were named in the third amended complaint. They were named in the fourth amended complaint, with the addition of the Commite Latino. No allegations were made as to the membership of the Commite and no motion for intervention was made. *See* 3B J. Moore, J. Kennedy, *Moore's Federal Practice* ¶ 23.90[2] (2d ed. 1985). The court ignored it as not properly a party to this class action and we agree.

On appeal the plaintiffs argue that res judicata was inappropriate because the court refused to require notice to the class. This does not affect application of res judicata against the

named plaintiffs. Any preclusive effect against potential class members not notified of the suit is not an issue before us. *See Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522 (7th Cir.1985) (second court decides for itself preclusive effect of first litigation).

2. **Identity of Causes of Action**

The trial court held that counts I of the third and fourth amended complaints were identical. It found that counts V and VI were premised on the same facts, which is sufficient identity for res judicata purposes.

A cause of action consists of "a single core of operative facts" which give rise to a remedy. *Mandarino v. Pollard*, 718 F.2d 845, 849 (7th Cir.1983) (operative facts were employment termination and surrounding circumstances), *cert. denied*, ____ U.S ____, 105 S.Ct. 116, 83, L.Ed.2d 59 (1984); *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230, 1234-35 (7th Cir.1982) (essential fact underlying first and second suit was seniority), *cert. denied*, 460 U.S. 1070, 103 S.Ct. 1526, 75 L.Ed.2d 948 (1983); *Lee*, 685 F.2d at 200 (cause of action consists of single core of operative facts).

Plaintiffs assert that they complain of violations of federal regulations in counts V and VI, charges not made in previous complaints. This argument is to no avail. The essential fact in count I of the third amended complaint was discriminatory fund disbursement. It is the essential fact underlying counts V and VI of the fourth amended complaint.

A mere change in the legal theory does not create a new cause of action. *Shadid v. Oklahoma City*, 494 F.2d 1267, 1268 (10th Cir.1974). *See also Harper Plastics*, 657 F.2d at 945 ("An unsuccessful party may not . . . frustrate . . . res judicata by cloaking the same cause of action in the language of a theory untried in the previous litigation."). Extensive evidence regarding compliance with the regulations was presented at trial.

Plaintiffs argue also that the general jury verdict is insufficient to determine precisely what was found on each issue. This confuses res judicata and collateral estoppel.

They assert that they were precluded from presenting evidence on injuries and deaths at the parks. The injury evidence went only to the issue of damages, not liability.

Both of the preceding arguments can be characterized as a challenge to the opportunity to fully and fairly litigate these claims. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); *Lee*, 685 F.2d at 201. This argument cannot be sustained in view of the three-month jury trial. Plaintiffs had a full and fair opportunity to litigate the issue of fund allocations. *See Jones*, 757 F.2d at 884; *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441, 451-52 (7th Cir.1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2656, 86 L.Ed.2d 273 (1985).

3. **Finality**

The plaintiffs challenged finality on the grounds that the September 23 order was insufficient for rule 54(b) purposes. The district judge did not agree but found that, even if the order was not applicable, it had the requisite finality for res judicata purposes.

Rule 54(b) requires that if a court enters final judgment on fewer than all the claims it must make a determination that there is no just reason for delay and expressly order the entry of judgment. FED.R.CIV.P. 54(b). The September 23 order did not technically comply with Rule 54(b), but it was clear:

> In order to enable the parties to this cause to appeal or cross-appeal, and in conformance with Rule 54(b), FED.R.CIV.P., counts II and III of the Third Amended Complaint are dismissed, subject to the right of plaintiffs to file a Fourth Amended Complaint. . . .

The plaintiffs argue that remarks made by the court at a post-judgment conference indicate that the judgment was not to be considered final. The remarks came upon entry of the order. Because it is clear, and because the parties were explicitly told that the court wanted guidance from an appellate decision, we are convinced that the parties knew of their right to appeal.

The court did say it would certify under 28 U.S.C. § 1292(b) the res judicata effect of the count I verdict on counts II, III and IV. Even though no 28 U.S.C. § 1292(b) certification was entered, this did not make less clear the September 23 order.

Finally, while not expressly determining there was no just reason for delay in the order itself, the judge did determine that an appeal would be in the interest of the public, the court and the plaintiffs. This litigation had been before Judge Leighton for four and one-half years.

Although reluctant to deviate from the strict Rule 54(b) requirements, we have held that less than technical compliance will suffice when neither party is prejudiced by the lack of formality. *Local P-171, Amalgamated Meat Cutters & Butchers v. Thompson Farms Co.*, 642 F.2d 1065, 1072-73 (7th Cir.1981); *accord Equal Employment Opportunity Comm'n v. Delta Air Lines, Inc.*, 578 F.2d 115, 116 (5th Cir.1978). Plaintiffs' prejudice, if any, stems from their choice not to appeal the September 23 order and not from lack of sufficient notice that the order was appealable.

Plaintiffs also challenge the dismissal of count IV of their third amended complaint on res judicata grounds. This issue was appealable as of September 23, 1983. We note that the district court correctly determined this issue.

The district court was also correct that the September 23 order was sufficiently final for res judicata purposes even if not appealable. *Lummas Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir.1961), *cert. denied*, 368 U.S. 986, 82

S.Ct. 601, 7 L.Ed.2d 524 (1962), held that judgments not final for § 1291 can be "'final' in the sense of precluding further litigation [depending on] such factors as the nature of the decision, . . . the adequacy of the hearing and the opportunity for review." *Accord O'Reilly v. Malon*, 747 F.2d 820, 822-23 (1st Cir.1984); *Commodity Futures Trading Comm'n v. Board of Trade of City of Chicago*, 701 F.2d 653, 657 (7th Cir.1983); *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1191 (5th Cir.1982), *rev'd on other grounds*, 460 U.S. 1007, 103 S.Ct. 1254, 75 L.Ed.2d 483 (1983).

There is no doubt that two of the three *Lummas Co.* factors have been met here. The jury rendered a verdict only after a protracted trial. *See also Aiello v. City of Wilmington*, 470 F.Supp. 414, 419 (D.Del. 1979), *aff'd*, 623 F.2d 845 (3d Cir.1980) (jury verdict final "in the sense of inalterable" from the date entered).

Title VII and § 1983

The district court dismissed the remaining counts of the Alexander plaintiffs' complaint on the grounds that Title VII is the exclusive remedy for employment discrimination charges. Under the principle established in *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir.1985), we reverse.

Title VII is not the sole remedy for employment discrimination claims of state employees. *Id.*, slip op. at 5-6. Congress intended to retain preexisting remedies. Only if the right asserted was created by Title VII must it be vindicated through the procedural system set up in that Act. *Accord Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir.1984). *See also Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 612 n. 1 (5th Cir.1983) (Title VII is remedy unless specific allegations of constitutional violations); *Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n. 4 (5th Cir.1982) (when § 1983 used as alternate remedy to Title VII, elements of cause of action are the same); *Whiting v. Jackson State University*, 616 F.2d 116, 121 (5th Cir.1980) (same).

We sympathize with defendants' position and note that our holding and that of the Sixth Circuit create the anomalous situation that a federal employee is limited by the administrative procedures of Title VII while state employees are not. Because we interpret what remedies Congress has provided, we rule as we do. Congress may amend Title VII if it so chooses.

Counts II and IV are based on the Fourteenth Amendment's protection against intentional discrimination based on class membership. *Trigg*, slip op. at 2; *Huebschen v. Department of Health and Social Services*, 716 F.2d 1167, 1171 (7th Cir.1983). They survive at this stage of the proceedings.

Count III is more problematic. Plaintiffs concede that it is based on statutory violations. Generally, where a statute provides its own comprehensive enforcement scheme, that scheme may not be bypassed by pleading an underlying violation of the statute and bringing suit directly under § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20, 101 S.Ct. 2615, 2626, 69 L.Ed.2d 435 (1981) (Federal Water Pollution Control Act, Marine Protection, Research and Sanctuaries Act); *Smith v. Robinson*, ____ U.S. ____, 104 S.Ct. 3457, 3468, 82 L.Ed.2d 746 (1984) (Education of the Handicapped Act); *Preiser v. Rodriguez*, 411 U.S. 475, 489, 93 S.Ct. 1827, 1836, 36 L.Ed.2d 439 (1973) (habeas corpus).

Title VII is one of the statutes that may not be bypassed. *Grand American Federal Savings v. Novotny*, 442 U.S. 366, 375-378, 99 S.Ct. 2345, 2350-52, 60 L.Ed.2d 957 (1979) (Title VII may not be bypassed via § 1985(3)). Is Title VI like Title VII in this respect?

We think it is. Title VI provides its own administrative enforcement procedure which would be bypassed by pleading Title VI violations under § 1983. Moreover, the remedies available under Title VI should in some cases be limited to declaratory and injunctive relief. *Guardians Association v. Civil*

Service Commission, 463 U.S. 582, 597-598, 103 S.Ct. 3221, 3229-30, 77 L.Ed.2d 866 (1983). This limitation would be lost in the broad grant of a remedy at law or equity available under § 1983.

Since Title VI provides its own remedial scheme, we hold that private actions based on Title VI may not be brought under § 1983. See *Guardians Association*, 463 U.S. at 610 n. 3, 103 S.Ct. at 3236 n. 3 (Powell, J., concurring).

Recusal

On November 12, 1982, plaintiffs filed disqualification motions against Judge Leighton under 28 U.S.C. §§ 144 and 455(a). The motions were based on statements by the court during the hearing on plaintiffs' motion for a preliminary injunction and findings and conclusions entered in ruling on that motion.

Again we rule against plaintiffs on this issue. Under section 144, bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966); *United States v. English*, 501 F.2d 1254, 1263 (7th Cir.1974), *cert. denied*, 419 U.S. 1114, 95 S.Ct. 791, 42 L.Ed.2d 811 (1975). The plaintiffs' affidavits set forth only rumor concerning the administration of the Chicago NAACP 25 years ago.

Plaintiffs' insinuations that the trial judge did not vigorously pursue alleged discrimination when he represented the NAACP are not an extrajudicial source of bias. What must stem from an extrajudicial source are facts and information.

Judge Leighton called as a witness Mr. Jones, a former President of the Chicago NAACP whom he had represented 25 years earlier. He indicated surprise that the plaintiffs had not called Jones or deposed him.

Contrary to plaintiffs' assertions, Jones' credibility was not automatically enhanced. The judge specified in denying the recusal motion that he had not prejudged Jones' testimony. *Cf. Roberts v. Bailar*, 625 F.2d 125, 127-29 (6th Cir.1980).

Section 455(a) requires recusal if the judge's impartiality might reasonably be questioned. 28 U.S.C. § 455(a); *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir.1985). The association between Judge Leighton and Mr. Jones in 1958 was ancient history and insufficient to support a recusal motion.

CONCLUSION

We affirm the dismissal of counts I, V and VI on res judicata grounds. We affirm the dismissal of count III for failure to state a claim. We remand counts II and IV to the district court to rule first on the several other grounds raised in the District's summary judgment motion.

Judge Leighton has dealt with this complicated case in an admirable fashion. We affirm his dismissal of plaintiffs' recusal motions.

This case has been in the court system since June 27, 1979. In the interests of bringing it to an end and decreasing the costs to the parties and the courts, we retain jurisdiction during this remand. After final orders are entered below, this case will be resubmitted to this court and panel without oral argument. Leave will be granted to file briefs within three weeks after the record is certified to us. *See Grano v. Department of Development of City of Columbus*, 637 F.2d 1073, 1082 (6th Cir. 1980).

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX 2

Silas ALEXANDER, et al.,
Plaintiffs-Appellants,

v.

CHICAGO PARK DISTRICT, et al.,
Defendants-Appellees.

No. 82-2783.

United States Court of Appeals,
Seventh Circuit.

Argued April 20, 1983.

Decided June 3, 1983.

Before BAUER, NICHOLS,* and WOOD, Circuit Judges.

HARLINGTON WOOD, Jr., Circuit Judge.

This is an appeal from the district court's denial of a preliminary injunction in a Fourteenth Amendment and 42 U.S.C. § 1983 "equal services" class action alleging that the Chicago Park District discriminatorily administers parks in black and latino neighborhoods which are inferior in condition and maintenance as compared to those parks situated in predominantly white neighborhoods. In their motion for a preliminary injunction, plaintiffs sought to restrain the Chicago Park District from adopting any budget, plan or scheme which fails to allocate funds to parks without regard to the race or ethnicity of their clientele, fails to indicate the breakdown of funds on a per-park basis, or fails to allocate funds for the immediate repair of unsafe facilities in certain of the parks; the motion also generally sought to restrain the expenditure of park funds in a discriminatory fashion. Emphasizing the weakness

* The Honorable Philip Nichols, Jr. of the United States Court of Appeals for the Federal Circuit, is sitting by designation.

of the plaintiffs' evidence of discrimination and the balance of equities, the district court determined that the prerequisites for preliminary equitable relief had not been demonstrated and so denied the motion. A full trial on the merits of the complaint is scheduled to commence almost simultaneously with the issuance of this opinion. Especially in view of this imminent opportunity to argue the full merits of this case, and in view of the complicated non-self-executing nature of the relief sought, we affirm.

I.

The centerpiece of plaintiffs' evidence at hearings on the motion was a comparative survey study of fifty-seven Chicago parks, executed over a period of several days by four individuals with no background in park administration or evaluation. The study purported to demonstrate, largely through undefined and subjective criteria, *inter alia*, that sixty-eight percent of the parks in white neighborhoods were "very clean" while only five percent of black and latino parks could be so described; that sixty-two percent of the parks in white neighborhoods were "very well kept," while only ten percent of black and latino parks were so maintained; that seventy-five percent of the white parks were in "good" condition compared with only fifteen percent of the black and latino parks; and that only black and latino parks were "hazardous," "poor" or unacceptable." In addition to this survey, there was also submitted photographic evidence and depositions of two newspaper reporters attesting to racially disparate park conditions observed in their simultaneous investigations. Plaintiffs and defendants also called expert witnesses in survey evaluation to respectively defend and attack the survey's methodology and integrity.

The district court found that the evidence offered by the plaintiffs was not sufficient to establish a reasonable likelihood of success on the merits of their discrimination claim. The district court particularly focussed on the lack of methodological rigor and sophistication in the conduct of the survey, the evidence chiefly relied upon by the plaintiffs. It concluded that numerous deficits combined to undermine the survey's credibility.

First, the district court noted, the evidence concerning the survey's timing, administration and staffing did not suggest either professionalism or minimal rigor. The director and author of the survey, for example, was a political scientist located in Washington, D.C. who had no experience in the evaluation of parks or park facilities, and no acquaintance with the Chicago Park District. Even more troublesome to the district court was the fact that the survey director was never present to control or even monitor survey administration, and instead communicated through a law student who was nominally in his employ but who operated out of the offices of plaintiffs' attorney. The director played no part in the hiring or training of the four surveyors, nor did he participate in post-inspection consultations and review, thus depriving him of a means to ensure that the conduct of the survey hewed to his design. Staff selection and training, the district court found, was also not such as to inspire confidence in the survey's reliability. The four surveyors were hired after brief interviews with the director's Chicago proxy (in at least one case, directly following the interview); two of the surveyors were demonstrably without any experience in the evaluation of park services, and there is no indication that the others possessed such training. Nevertheless, after two and a half hours of oral instruction, within two days the surveyors began their inventory in teams of two, during and around the Labor Day weekend in 1981, an exceptionally busy period for the public parks. Only one visit was allocated to each park, with no follow-up visits to test whether observed conditions were representative over time, and even these visits were concluded rapidly, in some cases at the rate of six per day. The hasty and cursory nature of the visits and the survey design, the district court noted, also calls into question the validity of specific evaluations. To take but two examples, the surveyors took no note of the recreational programs taking place in the parks, and, although the survey elicited descriptions of the availability of park lighting, all visits were made by daylight, thus preventing the surveyors from determining whether the erected lighting was functional.

Second, the district court noted, the lack of experience and training of the surveyors was exacerbated by shoddy survey design and tabulation. Most egregiously, the evidence established that the standards for site evaluation were neither precisely defined nor applied consistently throughout the course of the survey. Although the survey form contained evaluation checklists concerning cleanliness ("very clean," "clean," "in need of cleaning," and "unacceptable") and maintenance ("very well kept," "satisfactorily kept," "in need of care," and "unacceptable"), no definitions were furnished for these terms. Not surprisingly, the testimony established that the surveyors' standards of evaluation changed significantly over time, and that as a result of consultation with other surveyors, at least two survey answers were modified after the fact to reflect a shift in relativistic perspective. The elasticity of the evaluation categories is further suggested by the response of one surveyor who labelled at least one park as "excellent" even though he had noted broken water pipes, graffiti, broken glass, blocked lights, poor blacktopping and poor sidewalks. Further fluctuation in standards was virtually guaranteed by the fact that, although each park was surveyed in teams of two, only one evaluation checklist was provided for each park, making it quite possible that the relative persuasiveness of the two surveyors, rather than consistent direct observation, helped shape the final result. The district court found this fluidity and lack of objective indicia for evaluation especially troublesome in view of the bias inherent in the sharing of results among surveyors and the testimony of at least one surveyor that he had inferred the racial designations of some parks in advance of his survey and had allowed general neighborhood features to influence his park ratings. Finally, the district court found, whatever integrity these evaluations may have had was further eroded by the survey director's telescoping of the four-point evaluation spectrum into two-column data (e.g. the collapsing of "very clean," "clean," "in need of cleaning," and "unacceptable" into the categories "very clean" and "less than very clean"). And not

only were the park *evaluation* criteria of questionable value, the district court found, but also the validity of the survey's classification of each park's racial character was open to question. For example, the category of "white" parks included only those located in neighborhoods of whose residents more than ninety-nine percent were white, while a park was denominated "black" if located in a neighborhood of whose residents eighty percent were black. Also inconsistently, a sixty percent threshold was used to designate the "black" parks in connection with some of plaintiff's deposition testimony. Further, there was a lack of rigorous correspondence between the *park's* character and the *neighborhood's* character; at least one park designated as "white" was found to have been frequented by an equal number of hispanic, black, oriental and white people.

Most of these criticisms of the survey's design and execution were supported at the hearing by one of defendants' expert witnesses, an academic specialist in urban resources who had published several articles concerning the distribution of park resources and had made a detailed study of the allocation of Chicago Park District resources. To buttress the survey's credibility, plaintiffs called as an expert witness an academic survey specialist who was retained by the plaintiffs the day before his testimony and had spent less than three hours reviewing the hundreds of pages of handwritten documents and the survey report and questionnaire.

Aside from the survey, other evidence of the discriminatory allocation of resources among Chicago parks was before the district court and, like the survey, was found to be of questionable value. Plaintiffs, for example, submitted numerous photographs purporting to depict disrepair and heaps of detritus in certain parks, but many of the sites photographed were shown to be outside of park district property, or refuse dumps which are cordoned off from the main areas of the parks; some of the purported disrepair was shown to be in fact construction in progress. Plaintiffs also introduced the depositions of two

Chicago Sun-Times reporters purporting to describe racially disparate park conditions observed in their investigations, but these observations were also shown to lack even a modicum of rigor: one reporter testified that he had classified parks as white or black on the basis of his impressionistic sense of the host neighborhoods and that his visits were also short and unguided by any systematized method; the other reporter admitted to having prejudices and preconceptions concerning the relative conditions of Chicago parks and confessed that he had difficulty finding a very clean park in any Chicago neighborhood.

Defendants also offered positive evidence refuting the allegations of racially guided distribution of park resources. Defendants' expert witness, an urban resources specialist with a background in the distribution of park resources, undertook extensive review of Park District documents, including repair and maintenance orders, interviewed Park District personnel, and offered his conclusion that race was not a determining factor in the allocation of Park District resources. This neutral pattern was to some extent confirmed by the testimony of the Park District's director of safety who noted through statistical evidence that injuries and accidents were reported twice as often from "white" parks as from "black" parks. Finally, former and present Park District Commissioners testified to the general absence of discrimination against black parks and noted special affirmative park programs designed to reach disadvantaged communities.

Defendants also offered evidence pertaining to the effects of compliance with preliminary relief requested by plaintiffs: creation of a per-park budget, and the freezing of expenditures pending verification of the racially neutral character of Park District disbursements. There was evidence that a budget allocating specific sums for each of 574 parks would be too inflexible to allow response to special and unforeseen developments. And it was noted that since no expenditure is made

unless specifically authorized in a valid budget, a restraint on the 1982 budget of the Park District would result in great interference with Park District operations.

II.

The legal standards governing the issuance of a preliminary injunction are too familiar to merit extended discussion. To obtain such relief, the plaintiff must demonstrate that he has no adequate remedy at law or will be irreparably harmed if the injunction does not issue; that the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict upon the defendant; that the plaintiff has at least a reasonable likelihood of success on the merits; and that the granting of the injunction will not disserve the public interest. *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 613 (7th Cir.), *cert. denied*, —U.S.—, 103 S.Ct. 176, 74 L.Ed.2d 145 (1982); *Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Products, Inc.*, 545 F.2d 1096, 1097 (7th Cir.1976). The standards governing review of the district court's denial of a preliminary injunction are equally clear; we may not reverse unless there is demonstrated to be a clear abuse of the trial court's discretion or clear error in the trial court's findings. *Atari, Inc.*, 672 F.2d at 613. Even though the district court substantially adopted the defendants' proposed findings of fact and we are thus properly enjoined to exercise a somewhat more critical review of those findings, *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 731 (7th Cir.1979), *cert denied*, 445 U.S. 917, 100 S.Ct. 1278, 63 L.Ed.2d 601 (1980); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977), we must still defer in large measure to the district court's findings where, as is often the case here, they hinge greatly on the court's assessment of the credibility of observed witnesses. *Klokner, Inc. v. Federal Wire Mill Corp.*, 663 F.2d 1370, 1375 (7th Cir.1981); *Trabert and Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 479(7th Cir.1980). We find ample evidence in the record to support the district court's conclusion that plaintiffs have not demonstrated the threshold requirements for a preliminary injuction.

The most serious bar to relief below, and one which we have often described as the threshold requirement which must be met before other factors may be considered, *see, e.g., Reinders Bros., Inc. v. Rain Bird Eastern Sales Corp.*, 627 F.2d 44, 49 (7th Cir.1980); *Kolz v. Board of Education of City of Chicago*, 576 F.2d 747, 749 (7th Cir.1978), was the inability of the plaintiffs to show a reasonable likelihood of success on the merits. To prevail in a constitutionally based "equal services" case like the one before us, the plaintiff must demonstrate the existence of racially identifiable neighborhoods, substantial inferiority in the quality or quantity of the municipal service, and discriminatory intent or motive. *Dowdell v. City of Apopka*, 511, F.Supp. 1375 (M.D.Fla. 1981), *aff'd*, 698 F.2d 1181 (11th Cir.1983); *Johnson v. City of Arcadia*, 450 F.Supp.1363, 1379 (M.D.Fla.1978).

Here, the plaintiffs offered three major clusters of evidence to meet the second requirement of its equal services claim, the inferior quality of black and latino parks: the commissioned survey, the depositions of two *Chicago Sun-Times* reporters, and photographic evidence. But, as the district court found, there was substantial reason to believe that each of these items were unreliable. The survey was designed and directed *in absentia* by a political scientist who had no previous experience in the evaluation of park systems and who had no direct contact with those who conducted the survey; the training of the equally inexperienced surveyors was perfunctory and brief; the site visits were hastily conducted over one of the busiest periods of the year; the survey itself consisted of fluid, undefined criteria which not only elicited a single response from two surveyors but also invited substantial shifts in the surveyors' relative evaluation framework and even the *post hoc* amendment of answers as well as bias from discussions with other surveyors and from the appearance of the surrounding communities; even these fluid tallies were subsequently collapsed, thus altering after the fact the width of the response spectrum; different criteria existed for the definition of black and white host *neighborhoods;* and

there was evidence that even these categorizations did not accurately reflect the clientele of the respective *parks*. Similarly, there was evidence that some photographs submitted to prove allegedly substandard conditions in some parks in fact did not depict park property at all, or depicted only segregated refuse disposal or construction areas of the parks at issue. Finally, the deposition evidence of the newspaper reporters was found to be anecdotal, unsystematic and marred by the admitted pre-conceptions of the observers. In response, the defendant produced evidence based upon a detailed review of Park District practices that race was not a factor in park resource allocation, and offered evidence of heightened solicitude toward black park clientele.

Plaintiffs challenge as clear error twenty-one of the district court's findings cited by the district court as undermining the credibility of the survey and other evidence. We need not address each of these claims at length, for an examination of those challenges reveals that either they attempt to overturn conclusions reached from ample evidence, much of which concerned witness credibility, or they concern minor shadings of inference which do not affect the gist of the findings. For example, plaintiffs protest that the district court, in noting that one of the surveyors had no background in the survey or analysis of parks, ignored that the surveyor had training in participant observation of education programs in schools and playgrounds; we are not told, however, how this background refutes the conclusion that he was not familiar with the peculiar factors involved in the maintenance, repair and design of a city-wide park system about which sophisticated qualitative judgments were required. Plaintiffs also challenge the district court's finding that the immediate supervisor of the survey was a law student in the employ of plaintiffs' attorney; while in some administrative sense this student was responsive to the survey director's instructions, it was undisputed that she was paid by plaintiffs' attorney in the first instance (although her salary was later credited against the survey director's billings) and that she operated out of plaintiffs' attorney's office, factors which suggest

her closer responsiveness to the strategic needs of the litigation rather than the detachment crucial to objective survey science. Likewise, plaintiffs challenge the district court's finding that plaintiffs used differential statistical criteria for the designation fo black and white parks, noting that a lower threshold for black parks was necessary to increase the potential sample of black parks; left unexplained, however, are the reasons why the criteria for "white" parks could not have been equally relaxed, or why a wholly inconsistent sixty percent threshold was used in connection with black parks discussed in the deposition.

Several other findings of the district court—*e.g.*, that the survey director had no direct control over, or even ability to monitor, the execution of the survey; that the survey offered no precise or consistent standards for evaluation; that one surveyor was able to discern the racial designation of some parks before completing the survey; that surveyors' comparative evaluation framework changed and that questionnaire responses were modified after group consultation; and that certain questionnaire categories were recombined after data was gathered—are essentially uncontradicted by the plaintiffs, who nevertheless now dispute the level of emphasis properly attaching to each item. However, even after an independent review, and indulging every presumption in plaintiffs' favor, we believe that the district court did not err in concluding that the use of such dramatically open-ended criteria and *post hoc* manipulation or responses significantly undermined the credibility of the survey. Other findings challenged by plaintiffs—*e.g.*, that the survey director did not truly believe that his total insulation from the hiring and training of surveyors and the execution of the survey was usual and proper social science methodology; that the expert witness called to buttress the flawed survey after a cursory review of the underlying materials was not credible; and that the testimony of defendants' expert witness, who had concluded after an extensive documentary review and inventory of Park District practices that no evidence of discrimination existed, was to be heeded—clearly rest upon the district court's

observation of these witnesses, and as such should receive great deference. *Trabert and Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 479 (7th Cir.1980). In short, even if some of the findings concerning the gaps in the design and execution in the survey were in error, there is ample and essentially uncontradicted evidence in the record to leave us with the distinct impression that the survey and other evidence was incapable of supporting a finding of discrimination at trial. Whether or not these credibility gaps may be mended or otherwise compensated for at the full trial scheduled to commence shortly, we agree with the district court that they do not at this preliminary stage meet the plaintiffs' burden of proving that they are reasonably likely to prevail on the merits.[1]

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[1] We note in passing that, even had plaintiffs' evidence been sufficient to prove disparate impact, it would still be doubtful whether they had proved discriminatory intent or motive, the third prong of the "equal services" analysis. *Dowdell v. City of Apopka*, 511 F.Supp. 1375, 1383 (M.D.Fla.1981). It is true that in some cases where racially variant results cannot be explained on other grounds, *e.g.* in cases of a dramatic mismatch between jury representation and the composition of a surrounding community, a clear showing of disparate impact will support a *prima facie* case of discriminatory intent. *Castaneda v. Partida*, 430 U.S. 482, 496, 501-2, 97 S.Ct. 1272, 1283-1284, 51 L.Ed.2d 498 (1977). Unlike the case of racially exclusive juries, however, variance in the quality of parks could be due to myriad subtle factors, *e.g.* higher incidences of vandalism or larger stress resulting from a greater youth age cohort in the park's clientele. Indeed, plaintiffs' own survey report and expert witness specifically refused to posit any link between the patterns observed and discriminatory intent. But even if a *prima facie* case of discriminatory intent had been established, the extent of the rebuttal, including a detailed study of Park District resources and practices demonstrating that race was not a factor in resource allocation, suggests that plaintiffs' ultimate burden of proving discriminatory intent would not be easily satisfied on this record. We need not reach that issue here, as we agree with the district court that the evidence did not credibly support a finding of disparate impact, except to note that the requirement of this second level of analysis at the very least militates in favor of deferring relief until the conclusion of the full trial which is to commence shortly.

In addition to finding that plaintiffs were unable to demonstrate a reasonable likelihood of success on the merits, the district court also found that considerations of the public interest and the balance of hardships cautioned against the issuance of an injunction at this stage. It should be noted in this connection that plaintiffs have not intelligibly challenged the district court's finding that the proposed injunctive relief would have the short-term effect of severely hampering, if not freezing, the normal expenditure of Park District funds until such time as any proven racial disparities are eliminated. Plaintiffs assert that they merely seek to halt "the practice of masking unconstitutional discrimination behind a non-specific budget," but their requested relief by its very terms would immediately restrain the Park District from "[e]xpending or causing to be expended public funds in the allegedly discriminatory pattern," a restraint which would, if discrimination were proven, make impossible the expenditure of any Park District funds as the busy summer season approaches until the necessarily complicated process of ferreting out discriminatory allocations was completed. Paradoxically, then, the immediate effect of the requested relief would be to seriously threaten the provision of *any* Park District services to the very population which plaintiffs claim is currently underserved, a result hardly consonant with the public interest.

But even if a change in the budget format were the sole relief requested, it is difficult to perceive how the balance of hardships or the public interest compel relief at this preliminary stage. As a threshold matter, we note that there is no evidence in the record indicating that any practical benefit, much less an immediate one, would inure to the plaintiffs from the creation of a per-park budget; indeed, plaintiffs' survey author specifically refused to avow that any of the allegedly disparate conditions identified in his report could be linked to the Park District's aggregated budgetary categories. By contrast, the Park District produced evidence that per-park budgeting would be both impractical and inflexible in view of the likelihood of

unforeseen developments and the economic need to deploy and account for park services on an areal, rather than site-specific, basis. However, even if some link between park budgetary practices and allegedly discriminatory conditions were indicated by the evidence before us, it is hard to see why it would make any practical difference whether an ultimate remedy were postponed pending the conclusion of the full trial scheduled to commence shortly. Indeed, plaintiffs concede that a conversion to per-park budgeting will require an appropriate interval of readjustment. Thus, even if plaintiffs had identified cognizable discrimination and had identified budgetary non-compartmentalization as its source, in view of the necessarily complicated and gradual implementation of any such budgetary relief that could be provided at this stage and the grave operational disruptions that would be occasioned by an immediate order placing the Park District's budget and expenditures in legal jeopardy, the balance of equities suggests that such extraordinary relief should, if justified, follow the conclusion of the imminent full trial.

III.

Plaintiffs have alternatively urged this court to reverse and remand the order denying relief because the trial judge allegedly erred in his decision, contained in an order filed several months after the denial of the preliminary injunction, not to disqualify himself pursuant to 28 U.S.C. § 455(a). However, we note that an order rendered under 28 U.S.C. § 455(a) is not an interlocutory order appealable as of right under 28 U.S.C. § 1292(a). We have also previously noted that strong judicial policy considerations caution against allowing piecemeal appeals through the review of otherwise unappealable orders in the course of considering substantively unrelated interlocutory appeals. *Helene Curtis Industries, Inc. v. Church and Dwight Co., Inc.*, 560 F.2d 1325, 1335 (7th Cir.1977), *cert. denied*, 434 U.S. 1070, 98 S.Ct. 1252, 55 L.Ed.2d 772 (1978); *Rosenfeldt v. Comprehensive Accounting Service Corp.*, 514 F.2d 607, 611 n.

5 (7th Cir.1975). As noted in 9 J. Moore, Federal Practice ¶ 110.25[1] at 272 (1973),

> Even where an interlocutory order such as an injunction has been properly appealed and other incidental orders or questions non-appealable in themselves are sought to be reviewed, it must be remembered that the appellate court will usually review only that part of the order which relates to the injunctive relief afforded or denied and those questions basic to and underlying the specific order which supports the appeal.

Since the plaintiff will be able to obtain appellate review of the order denying disqualification after a final decision on the merits, thus allowing for a full contextual assessment of any possible appearance of impropriety, and in view of the fact that plaintiff has already obtained review of the order from this court through a mandamus proceeding,[2] we decline to contravene settled judicial policy in order to permit intermediate appeal on this issue.

For the foregoing reasons, the district court order denying preliminary injunctive relief is affirmed.

AFFIRMED.

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[2] On February 8, 1983, in an unpublished order, this court denied plaintiffs' Petition for a Writ of Mandamus seeking review of the district judge's refusal to disqualify himself pursuant to 28 U.S.C. § 144 and § 455(a). *Alexander v. Leighton*, No. 83-1161 (7th Cir. Feb. 8, 1983). Plaintiffs' Petition for Rehearing En Banc of that decision was subsequently denied, also in an unpublished order, *Alexander v. Leighton*, No. 83-1161 (7th Cir. April 4, 1983).

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

SILAS J. ALEXANDER, et al., *Plaintiffs,* *vs.* CHICAGO PARK DISTRICT, et al., *Defendants.*	No. 79 C 2242 Before the Honorable George N. Leighton United States District Judge

MEMORANDUM

This civil rights suit is brought by plaintiffs who are Negroes and Hispanics; they sue on their own behalf and on behalf of a class which has been certified. They assert claims under the 14th Amendment, Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000(a), *et seq.*, and 42 U.S.C. §1983. The complaint in five counts, seeks damages, injunctive and declaratory relief against maintenance by defendants of what plaintiffs allege is a racially discriminatory municipal park system.

In a motion for preliminary injunction verified by their lead counsel, plaintiffs seek injunctive relief pendente lite restraining defendants, their agents, employees, servants, and attorneys, from adopting or seeking to adopt any budget that fails to provide "for substantially equal allocations of the said funds to park facilities without regard to race, color or ethnic derivation of the users of the park facilities. . [or any budget that] fails to show on a per-park basis the sums to be expended, in such fashion as to permit determination of whether and to what extent black and Latino [sic] parks are discriminated against in terms of allocation of funds."

This motion has been heard over an unusually long period of time, the evidence consisting of many exhibits and the testimony of witnesses, lay and expert; a large number of exhibits has been received. Oral and written submissions to the court have been made by the parties; and the court now files this memorandum of its findings of fact and conclusions of law.

I. **Findings of Fact**

1. The petitioners are the class of plaintiffs in the instant action which is presently designated as all Black and Hispanic residents of the City of Chicago who have allegedly been injured by acts of the defendants.

2. Respondents are the Chicago Park District, Leslie P. Liss, Patrick O'Malley, Theodore Jones, Jean Foran, William A. Lee, Sydney Marovitz, Iola McGowan, Raymond F. Simon and Edmund Kelly.

3. Chicago Park District, hereinafter referred to as District, was created by the Illinois legislature by a statute enacted July 10, 1933 and approved by voter referendum on April 10, 1934. (Ill. Rev. Stat. ch. 105, §§333.1 and 333.3). It is comprised of five hundred seventy-four (574) parks, playgrounds and playlots of various sizes and is intended to provide recreational services throughout the territorial limits of the City of Chicago. District employs approximately three thousand four hundred (3,400) employees; it maintains approximately seven thousand three hundred and twenty-one (7,321) acres of land and operates some eighty (80) divisions and departments. District is governed by a five (5) person board of commissioners, members of which are appointed by the Mayor of Chicago to serve for varying periods of time; it is managed by a general superintendent who oversees department and divisional leaders.

4. Liss, during all the time relevant hereto, was an attorney employed by district. O'Malley, from April 6, 1973 to April 28, 1980; Jones, from February 1, 1977 to April 25, 1979;

Foran, from May 28, 1975 to April 25, 1979; Lee, from April 25, 1969 to April 25, 1980, were Commissioners of District. Mr. Lee was reappointed a Commissioner on May 5, 1982. Sydney Marovitz has been since December 4, 1974, a Commissioner of District. Iola McGowan has been since May 16, 1979, a Commissioner of District. Raymond F. Simon was from May 16, 1979 to May 20, 1982, a Commissioner and the president of District. Edmund Kelly has been, at all relevant times the General Superintendent of District. The individual rspondents are sued herein individually as well as in their official capacities.

5. On December 2, 1981, plaintiffs filed their motion for a preliminary injunction seeking an order from this court restraining defendants from approving the 1982 budget of the Chicago Park District. The alleged support for the motion is a "report on a survey of parks, personnel, facilities and conditions in the City of Chicago," dated November 13, 1981. On December 3, 1981, defendants filed their objections to the motion and a supplemental objection was submitted on December 7, 1981.

6. The budget of the Chicago Park District designates the amount of monies appropriated for all of the departments, divisions and accounts of the District for a particular year. The District budget is implemented for each calendar year by the Office of Comptroller, is approved, after public hearing, by the Board of Commissioners and is implemented by the General Superintendent and department leaders. For the purpose of expenditure and accounting control, the appropriations in the 1982 budget are made in accordance with the standard classification of accounts provided for in the official manual of accounts and published by the Comptroller pursuant to the Code of the Chicago Park District. The Comptroller and the heads of departments and divisions of the Chicago Park District must administer the amounts appropriated in this ordinance by standard accounts as specified by code numbers, designation of which may be amended or altered by the Comptroller to suit the needs of proper classification in accordance with the official manual of accounts of the Chicago Park District in which are

specified the details of personal services, materials and supplies, machinery and equipment, land, improvements and extraordinary expenditures by contract, contractual services, and special and other expenses. The heads of departments, divisions and other subdivisions of the District are prohibited from incurring any liabilities against any account in excess of the amount in the 1982 budget appropriated for such account.

7. On or about October 26, 1981, the Chicago Park District, through its Office of Comptroller, proposed its annual appropriation ordinance and revised budget for 1982. On December 21, 1981, the Board of Commissioners approved the 1982 budget. The budget went into effect on January 8, 1982 and the District is operating pursuant to that budget at the present time.

8. The District budget is the sole means of funding and control of monies used by all departments and divisions of the District, including: Office of the Treasurer, Department of Treasury, Department of Comptroller, Department of Purchases, Office of General Superintendent, Division of Marine Services, Department of Law, Department of Personnel and Civil Service, Injury Compensation Committee, Office of Secretary, Department of Engineering, Department of Budget and Management, Department of Auto Parking, Zoological Department, Department of Public Information, Department of Recreation, and all subdivisions of these departments.

9. Prior to the filing of the plaintiffs' motion, but during the pendency of this case, the budgets of the Chicago Park District for the years 1979, 1980 and 1981 were proposed by the Office of the Comptroller, approved after public hearing, by the Board of Commissioners, and implemented by the General Superintendent and department leaders without any objection by the plaintiffs.

10. On December 29, 1981, this court began hearing plaintiffs' motion for preliminary injunction. Plaintiffs' first

witness was Manford Holmes, a teacher in the field of special education. Prior to his involvement in this case, he had no experience in the survey or analysis of parks, and had no familiarity with the planning or maintenance of parks.

11. On August 25, 1981, Holmes was interviewed at the law offices of Rufus Cook, plaintiffs' counsel, by Judith Richardson. Judith Richardson was a law student and an employee of the law offices of Rufus Cook. The interview lasted about 45 minutes and, at its conclusion, Holmes was told by Richardson that he was hired as a park surveyor. The other members of the survey team were Brian Fogel, Elaine Matuga and Audrey Kelly. They were all interviewed and hired by Judith Richardson. On August 25, 1981, Judith Richardson introduced Holmes to a questionnaire on which he and other members of the survey team were to make notations concerning parks they were to visit.

12. The questionnaire forms first used by Holmes called for information as to the time (morning, afternoon, or evening) of a park visit as well as information concerning observations at the park. The questionnaire made reference to a Chicago Park District list of facilities and a check-off procedure was used to note observations as to the availability and condition of facilities. The questionnaire included a section for observations on the number of park personnel, their race and sex. The designations for race were "Black", "White", and "Other". Information concerning park lighting was also requested. Conclusions were to be made regarding the cleanliness of a park which requested the surveyor to check off one of the following categories: "very clean", "clean", "in need of cleaning" and "unacceptable". No definitions were supplied for those terms. The questionnaire called for conclusions on maintenance and whether park grounds were "very well kept", "satisfactorily kept", "in need of care", or "unacceptable". No definitions were furnished. The questionnaire then requested the general impression of the surveyor as to whether the park was "good" or "poor". The following definitions were given:

> good—park is clean, well maintained, with equipment in good repair and having evidence of frequent use;
>
> poor—park in need of care, is poorly maintained, dirty, with equipment in poor repair or not useable.

Finally, the questionnaire included space for the comments and impressions of the observer.

13. On August 25, 1981, Holmes participated in a pretesting of the questionnaire which consisted of visits to Memorial Park and Ridge Park, the model park for the survey team. Holmes observed that Ridge Park gave him a sense of relaxation and leisure and scored it as very clean and well maintained. Subsequently, it was determined that Ridge Park should not be the model park as other parks were better.

14. The pretest was completed on August 25, 1981. In the evening of August 25, 1981, the four members of the survey team and their head, Judith Richardson, discussed their observations. As a result of the meeting, the questionnaire was amended. A change was made and the categories describing the overall conditions of the park were expanded from "good" and "poor" to "good", "fair", and "poor". The "fair" category was defined as follows:

> park in need of some care, is not adequately maintained with some equipment in disrepair.

15. There were no stated definitions for the "cleanliness" and "maintenance choices. Holmes received some guidance on those terms and their subdivisions from Judith Richardson and a Mr. Dotledge, whom he knew as an advisor who attended the survey team meetings held at the offices of Rufus Cook. Holmes relied on Dotledge's advice.

16. On August 27, 1981, Holmes began his survey with the amended questioninaire. His visits continued on August 28 and 29 and on September 1, 2, 4 and 5, 1981. The work days began at 9:15 or 9:30 a.m. and finished no later than 5:30 p.m. Each

day the survey team would return to the offices of Rufus Cook and discuss their observations and conclusions with Judith Richardson, Dotledge and Rufus Cook.

17. Plaintiffs' practice of designating parks as "black" or "white" is inconsistent and confusing. In his report, Koehler designates "black parks" as those in wards where the population is greater than 80% Black. "White parks" are those within wards whose population is less than or equal to 1% black. The plaintiffs have varied that standard from time to time. For example, in the depositin of Raymond Simon, the plaintiffs employ a 60% standard for determining the alleged White and Black areas.

18. It has never been the practice of the defendants to designate a park as "White", "Black", or by any other ethnic reference. The parks are open to the public; defendants maintain and administer these parks for persons of all races, creeds, and color.

19. Prior to and during his survey visits, Holmes learned of the alleged racial identities (White, Black or Spanish) of the parks.

20. Holmes noted his observations and conclusions of a park on the questionnaire. He completed his questionnaires on the basis of one visit per park. No followup visits were made to any park to determine if any observed conditions changed.

21. The analysis which was made on the number and race of park personnel was based on observations of persons believed by the surveyors to be working at a park during the time of a visit. The findings as to park users were based on observations of persons using the park and their race at the time of the survey visits.

22. No observations were made as to the recreational programs in effect at any park.

23. Holmes noted his observations on park lighting on the questionnaire. Nearly all of his park visits were made in the

morning or afternoon. Holmes was unable to determine if lighting was or was not functional.

24. Many types of observations were made by Holmes. At Chopin Park, Holmes observed that there were squirrels and birds.

25. One of the parks visited by Holmes was Park No. 410. Holmes understood that to be a "Black" park and stated on his questionnaire that it was one of the worst and was unacceptable. On the questionnaire, Holmes rated the park as being "clean". Holmes visited Chase Park which he understood to be a "white" park. Holmes observed damaged basketball standards, graffiti, no basketball nets, missing fence sections, broken storm covers and locker room vandalism. Holmes rated Chase Park as fair.

26. In the evenings there were team discussions where Holmes shared data with the other team members and Judith Richardson. During the evening sessions, observations which had been made on questionnaires were often changed and revisions on questionnaires completed days earlier were made. The opinions and ideas of the survey team members changed during the course of the survey.

27. Holmes knows of Dr. Koehler, but has never had any contact with him. Dr. Koehler did not interview, hire or train Holmes. During the entire pretest and survey process, Holmes never spoke with Koehler.

28. Brian Fogel testified on behalf of the plaintiffs. He was one of the survey team members, and is seeking a Masters degree in social sciences from the University of Chicago. He is from New York, is 24 years of age, and has lived in Chicago since August 19, 1981. Fogel was interviewed and hired by Judith Richardson. Prior to August 19, 1981, Fogel had never seen a Chicago Park and had no familiarity with the Chicago Park District system. He has never been involved in a survey regarding urban resources. He entered the project with absolutely no experience with parks or park districts and all of his training and experience was received from Judith Richardson.

29. Fogel undertook a two and one-half hour instruction process with Judith Richardson. He received all of his instructions from Richardson. He was told to familiarize himself with the questionnaire, visit parks, observe conditions and to look for signs of disrepair.

30. Each evening during the survey, Fogel, the other team members and Richardson would meet to discuss their observations and conclusions. Occasionally, Rufus Cook and Joseph Dotledge would be present. Dotledge offered advice which Fogel stated was not used by any team member.

31. Fogel visited about 30 parks and noted his conclusions on the questionnaires. Influences outside of the parks such as the character of the neighborhood, traffic and business in the area were considered by Fogel in arriving at his overall impression of a park.

32. Fogel had discussions with other team members as to their observations and conclusions on parks which they visited. These discussions caused him to change observations which he noted during his park visits and led to amendments to the questionnaire form including an expansion of the overall condition categories from "good" and "poor" to "good", "fair", and "poor". Fogel, himself, used the term "excellent" and "perfect" in describing some parks.

33. As Fogel observed more parks, his perspectives began to change. The standards for the evaluation of parks varied as the survey progressed.

34. Kelvyn Park, an alleged "White" park, was rated excellent and found to be in perfect condition by Fogel. Fogel observed broken water pipes, graffiti, broken glass, blocked lights, poor blacktop and poor sidewalks at that park.

35. Paschen Park was designated as a "White" park. Fogel observed equal use among Spanish, Black, White and Oriental people during his visit to that park.

36. During the entire time of his involvement in the project, Fogel never had direct communication with Dr. Koehler.

37. Dr. David Koehler was called as a witness on behalf of the plaintiffs. He has an undergraduate degree in mechanical engineering and an advance degree in political science, and is a professor at American University in the field of political science and government. Together with his wife, he formed Policy Research Consultants, a private firm which does social science research. Koehler resides in Washington, D. C. Koehler has never before studied parks or park districts, nor was he familiar with the Chicago Park District. Prior to his "report", his publications have been limited to governmental subjects.

38. Koehler has been a friend of Rufus Cook, the plaintiffs' counsel, since 1958. Koehler was retained by Rufus Cook in June, 1981 to author a survey of the Chicago parks. Subsequently, Koehler reviewed the complaint which had been filed by the plaintiffs and made an analysis of what was needed to prove the allegations. With guidance and suggestions from Rufus Cook, Koehler prepared a survey questionnaire.

39. Judith Richardson, an employee of Rufus Cook, handled the interview and selection of the survey team which would implement the questionnaire. On directions she received from Dr. Koehler by long distance telephone, Richardson selected four of the ten applicants for the survey position. Koehler had no part in the rejection of applicants. The training of the survey team and pretesting of the questionnaire was handled by Richardson.

40. During the entire survey process, Koehler remained in Washington, D.C. Koehler had no direct communication with the survey team during the survey process. Any relationship which he had with the survey team was conducted through Richardson by telephone or correspondence. Koehler knew that this is not the normal way to conduct a survey.

41. The report of Koehler which purported to analyze the survey of 57 parks was prepared in November 1981. The scope of the report was described as follows:

> It is not within the scope of this research to assign responsibility for the observed relationship between the 'race' of a park and its quality.

42. The conclusions reached by the survey team concerning their single visits to parks provided the foundation for the report which Koehler authored.

43. Koehler was not aware that during the survey process, the survey team was meeting and sharing data. He was not aware that survey standards were changed during the course of the study. Koehler did not know that Rufus Cook and Mr. Dotledge attended some of the survey team meetings. Koehler did not know who Dotledge was.

44. Koehler intended for the survey teams to be racially mixed and consist of persons of both sexes. The team composition was changed by Richardson and the team members so that the teams were either all "Black" or all "White". In the majority of instances, the Negro team visited "Black parks" while the Caucasian team visited "White parks".

45. With respect to facilities, Koehler concludes that there is no correlation between the presence of facilities and the "race" of a park.

46. The Koehler report and the graphs prepared by the plaintiffs consolidated the conclusions of the survey team members. With respect to "cleanliness", the questionnaire categories of "very clean", "clean", "in need of cleaning" and "unacceptable" were collapsed in the report and graphs into "very clean" and "less than very clean". The "maintenance" categories of "very well kept", "satisfactorily kept", "in need of care" and "unacceptable" were consolidated in the report and graphs as "very well kept", or "less than very well kept". As to

"overall condition", the questionnaire choices of "good", "fair" and "poor" were collapsed into "good condition" and "less than good condition".

47. Koehler stated that he could not draw any conclusion as to the cause of any observed condition and that a determination of racial discrimination by the Chicago Park District is beyond the scope of the data.

48. Koehler has not made any correlation between findings of park conditions and the 1982 budget of the Chicago Park District.

49. The survey of parks made on behalf of the plaintiff was made by surveyors who lacked sufficient training to draw the conclusions which they reached on their single visits to the parks.

50. Information called for by the questionnaire, when viewed in the context of the survey procedures, is meaningless. For example, the questionnaire called for information on park lighting and data was compiled on that subject. Yet, the survey visits were made in the morning or afternoon with no opportunity to observe the functioning of lighting.

51. The survey is not credible because the surveyors were not provided with precise and constant standards for their evaluations.

52. The survey is not credible because the surveyors were not objective. They were provided with the alleged identity of parks (White, Black, etc.) before they made their visits. They also allowed their impressions of the neighborhood or business community surrounding a park to enter into their conclusions about the condition of the park.

53. The survey is not credible because of the complete lack of contact between the surveyors and Dr. Koehler. As the survey designer, Dr. Koehler should have interviewed the survey team applicants. Koehler should have had control over

the rejection of applicants. Koehler should have had direct contact with the team members when questions arose concerning their observations.

54. The survey is not credible because of the manner of completing each questionnaire. Each questionnaire was shared by two individuals. The critical sections of the questionnaires—the portions relied on by Koehler in his report—were the multiple choice sections on cleanliness, maintenance and overall condition. There was only space for one response as to those sections. The responses to those sections were subject to the compromise of the individuals sharing the questionnaire. Moreover, the more persuasive a particular member was, the more likely it was that his own selection would be reflected on the questionnaire.

55. The survey is not credible because of the evening meetings of the survey teams where data was "shared", where outside influences such as Joseph Dotledge advised the team members on the completion of their questionnaires, and where questionnaires which had been completed days earlier at the parks were amended.

56. The survey is not credible as it was based on one visit to approximately 57 parks between August 27, 1981 and September 5, 1981. The majority took place during the Labor Day Weekend—a time period of extreme use of the parks. A team member would visit up to six parks a day during the survey. Valid judgments concerning overall park conditions could not be made.

57. The survey is not credible because the standards of judgment employed by the surveyors varied during the course of the survey. Their conception of whether a park was "good", "fair", or "poor" was different at the end of the survey than at the beginning and no attempt was made to re-analyze parks in light of the changed standards.

58. David Garth Taylor, an assistant professor of political science, testified on behalf of the plaintiffs. Mr. Taylor

expressed his opinion as to the validity of the questionnaire and survey techniques.

59. There is little probative value in Mr. Taylor's testimony. He was retained the evening before he was to testify and spent some three hours reviewing and "analyzing" the voluminous questionnaires and data.

60. Plaintiffs introduced the deposition testimony of *Sun-Times* reporters, Morton Newman and Kevin Lamb. Their testimony relates to their visits to parks in 1979. Their testimony is not probative; it is replete with opinions, conclusions and generalities. Newman's testimony is tainted by his "preconceptions" concerning parks and the Park District. Their testimony is in no way supportive of the Koehler report as Newman, himself, when shown the Koehler report, stated that he could not address the specifics set forth in the report.

61. Dr. Kenneth Mladenka testified on behalf of the respondents. He is a professor at Texas A&M University who specializes in the field of the analysis of urban services. He has studied park and recreation systems in several states and has published many articles concerning the distribution of park resources. While serving as a visiting professor to Northwestern University, Mladenka studied the allocation of resources of the Chicago Park District. He interviewed Park District personnel, analyzed documents and published his findings. He spent several hundred hours in such endeavors. He is also familiar with the plaintiffs' surveys and has analyzed the Koehler study.

62. From August 1981 through June 1982, Mladenka resumed his analysis by interviewing Park District personnel and reviewing documents. The reviewed documents included memoranda from the Landscape Maintenance Department regarding the hours worked by personnel and Repair and Construction Department documents pertaining to park repairs and hours worked.

63. In his studies, Mladenka reviewed the demographic and ward data and has formed opinions as to whether race is a determining factor in the allocation of the resources of the Park District.

64. Professor Mladenka gave the opinion that racial composition of a ward in the City of Chicago has not been a determining factor in the allocation of park acreage within the ward; and that racial composition of a ward in the City of Chicago has not been a determining factor with respect to park facilities and programs within the ward.

65. Alvin Bielak testified for defendants. He is the assistant supervisor of the Repair and Construction Department of the Park District. This department is divided into four geographical divisions of the City of Chicago: South, North, West and Central. Tradesmen at the locations service parks within their division. The number of tradesmen within each area is as follows: South—103; North—100; West—103; Central—60.

66. Park Supervisors are responsible for informing the Recreation and Repair and Construction Departments of any condition within their parks which is in disrepair. In 1981, the Repair and Construction Department received approximately 2,000 written requests from park personnel and approximately 15,000 telephone orders for repairs from park personnel and the public. There is a backlog of repair requests in each of the repair areas due to a manpower shortage. The Department's first priority is the repair or removal of dangerous conditions.

67. Photographs submitted by plaintiffs show certain sections of some of the alleged "Black" parks and depict conditions of disrepair and vandalism. Many of the photographs depict scenes which occur on a frequent basis in the parks (i.e., glass or trash on the ground). It is not possible for District to address such problems as fast as they occur. District attempts to make repairs in each of its areas to the fullest extent

of its available manpower. Photographs tendered by the defendants show repairs and depict sections of parks not shown by plaintiffs' photographs.

68. Many of the photographs submitted by plaintiffs do not depict property controlled and maintained by the Park District. The Chicago Housing Authority and Board of Education are responsible for such property.

69. Plaintiffs submitted several photographs concerning Douglas Park. Several of the photographs depicted scenes of disrepair to a playground area. Testimony and other photographs reveal that the disrepair was due to emergency construction on the parks property; and that three other playgrounds in the park, in excellent condition, were available to park users. The Douglas Park photographs also depict conditions within a refuse dump which is maintained there. Similar dumps are maintained at Montrose and Lincoln parks. The dumps are only for the use of authorized Park District personnel.

70. Taken in its entirety, the photographic evidence and testimony offered by the plaintiffs and the defendants does not establish that race is a determining factor with respect to the maintenance and repairs of parks.

71. Jerome McKinney testified on behalf of defendants. McKinney is the Director of Safety of the Park District. His department is divided into three geographic areas and McKinney's staff includes three park inspectors. The Department of Safety maintains all reports of accidents within the parks. McKinney reviewed the number of accident reports filed in 1980 and 1981 for White parks (parks in wards where the population was 80% or more "White"), "Black" parks (parks in wards where the population is 80% or more "Black") and other parks.

72. In 1980, there were 307 accidents reported in "Black parks", 589 reported in "White parks" and 876 in other parks

(parks other than 80 Black or White). In 1981, there were 243 reported in "Black parks", 741 in "White parks" and 739 in other parks.

73. Terrence Barella, the director of the Department of Budget and Management of the Park District, was called by Respondents. His department compiles data for the budget and drafts the budget. The budget is the subject of public hearings and is approved by the vote of the Board of Commissioners.

74. The 1982 budget of the Park District is not a park-by-park type of budget. The budgets in effect for 1979, 1980 and 1981 were similar in form to the 1982 budget.

75. The 1982 budget of the Park District is in conformity with Illinois law. The statute also requires that budget preparations begin in the spring of the year before the budget is to be in effect.

76. The Comptroller of the Park District implements the budget and assures that no expenditure is made which is not expressed by the budget.

77. Race has not been mentioned in connection with any of the written or verbal preparations of the budget.

78. A park-by-park budget for 1982 would not be accurate. That type of budget would be inflexible and impractical as it would require the Park District to allocate a specific amount of money and other resources to each of its parks without regard for unforeseen developments. The same problems would exist for the "major park" budget which was suggested by Lavern Kron, a witness for plaintiffs.

79. If the 1982 budget of the Chicago Park District were halted or restrained in any way, all allocations would be frozen. All operations of the Park District would cease. The Park District and the public would suffer irreparable harm.

80. There is evidence in the record consisting of the deposition testimony of Commissioner Iola McGowan who testified concerning her 12-point plan for upgrading the parks. Her 12-point program was not addressed to discrimination. She also gave her views on the problems which would be encountered with a per-park budget.

81. Theodore Jones was called as the court's witness. During his tenure as a Commissioner, Mr. Jones attended most meetings of the Park District Board. He is personally familiar with several parks. With respect to personnel, he initiated and won approval of an affirmative action employment program. He testified concerning the responsiveness of the Park District Board to his suggestions which included capital improvements at the South Shore Country Club and Jackson Park, a golf driving range on the South Side, funding for the DuSable Museum of African/American History, and work at the 31st Street Beach.

II. Conclusions of Law

1. This court has jurisdiction over the parties and subject matter of this suit under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983.

2. The gist of plaintiffs' claims in this case is that defendants have subjected them to invidious discrimination, intentionally on the ground of race, in the allocation of resources for parks within the Chicago Park District system. "Determining whether invidious discriminatory purpose was a motivating factor [in defendants' administration of the park system] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252, 266 (1977). Making this kind of determination requires the most careful consideration of which this court is capable. See *Holt v. Sarver*, 309 F.Supp. 362, 365 (E.D. Ark. 1970). This court has given the case this kind of consideration; it has furnished plaintiffs with every possible opportunity to

present evidence which would make the showing required for issuance of preliminary injunctive relief. The court has constantly borne in mind that persons complaining as do plaintiffs in this case, are often faced with insurmountable difficulties of proof. The record of these proceedings reflect the latitude that has been given plaintiffs and their counsel.

3. The preliminary injunction that plaintiffs seek is a mandatory one. Defendants perform one of the most important public functions discharged by any group of state officials within the jurisdiction of this court. They administer a municipal recreational system that contains 574 parks, playgrounds and playlots of various sizes in the second largest city of this country. Judges of state and federal courts generally say that a mandatory injunction against public officials is an extraordinary remedy reserved only for the extraordinary case.

4. When this court is asked to decide whether to issue a preliminary injunction, it must consider four elements: One, whether the plaintiff has an adequate remedy at law or will otherwise be irreparably harmed if the injunction does not issue. Two, whether the threatened injury to the plaintiff outweighs the threatened harm that the injunction may inflict on the defendants. Three, whether the plaintiff has at least a reasonable likelihood of succeeding on the merits at trial. And four, whether the granting of the preliminary injunction will disserve the public interests. *Atari, Inc. v. North American Phillips Consumer Electronics Corp.*, 672 F.2d 607, 613 (7th Cir. 1982). The party applying for preliminary injunctive relief has the burden of persuasion as to all of these prerequisites. *Fox Valley Harvester, Inc. v. A. O. Smith Harvestone Products, Inc.*, 545 F.2d 1096, 1097 (7th Cir. 1976); see *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 435 F.Supp. 1289 (N.D. Ill. 1977).

5. As to the first prerequisite, it is clear that plaintiffs, assuming they have a claim on which relief can be granted, do not have an adequate remedy at law. However, there has not

been any testimony by a plaintiff park user establishing how he or she would be irreparably harmed if an injunction does not issue in this case.

6. As to the second prerequisite, it is clear from the evidence in this case that the injury to the plaintiffs does not outweigh the threatened harm an injunction may inflict on defendants. They are public officials entrusted with the responsibility of administering a city-wide park system. The injury to them that would flow from an injunction is incalculable.

7. From the evidence this court has heard, applying to it the tests of credibility and weighing all of it carefully, it does not appear that plaintiffs have at least a reasonable likelihood of success on the merits at trial. The park survey which plaintiffs' lawyer obtained is not credible evidence; it is not probative; it does not show that plaintiffs are likely to recover in this case. This court found it necessary to call as its witness, Mr. Theodore Jones, a member of the Negro race, a civic leader in the Negro community of Chicago, a former president of the Chicago Branch, National Association for the Advancement of Colored People. Mr. Jones was neither deposed nor interviewed by the plaintiffs prior to the hearing of the motion for preliminary injunction. This court concludes in evaluating Mr Jones' testimony that he would have disclosed, as candidly as he testified, any basis that would support the plaintiffs in this case. He did not. Taking his testimony, together with all of the other evidence this court has heard, the court is satisfied that there is very little likelihood of plaintiff succeeding on the merits at trial in this case.

8. As to the fourth prerequisite, it is evident that in this case the granting of a preliminary injunction will disserve the public interest. Such relief granted plaintiffs would paralyze the Chicago Park System; it would disrupt one of the most important sources of public recreation in this great city of Chicago. Plaintiffs have not established justification for such injunctive relief that would have this kind of impact on the public interest.

9. Based on these conclusions of law, which conclusions are supported by the findings of fact this court has made, an appropriate order will be entered denying plaintiffs' motion for a preliminary injunction.

So ordered.

/s/ GEORGE N. LEIGHTON
George N. Leighton,
United States District Judge

Dated: SEP 30 1982

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

SILAS J. ALEXANDER, et al.,
Plaintiffs,

vs. No. 79 C 2242

CHICAGO PARK DISTRICT, et al.,
Defendants.

MOTION FOR DISQUALIFICATION OF JUDGE DUE TO BIAS OR PREJUDICE PURSUANT TO 28 U.S.C. SECTION 144

Plaintiff, RENEE' BRADFORD, files herewith her affidavit as required by Title 28, United States Code, Section 144, to show that the HONORABLE JUDGE GEORGE N. LEIGHTON has a personal bias or prejudice against her, or a bias in favor of the defendants herein.

Based thereon, plaintiff RENEE' BRADFORD respectfully moves that the HONORABLE JUDGE GEORGE N. LEIGHTON proceed no further herein and that another judge be assigned to both hear this motion and the subsequent proceedings herein.

BY: /s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10 day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

AFFIDAVIT OF RENEE' BRADFORD, PLAINTIFF, IN SUPPORT OF MOTION TO DISQUALIFY JUDGE FOR BIAS OR PREJUDICE PURSUANT TO 28 U.S.C. SECTION 144

I, RENEE' BRADFORD, being duly sworn, say:

1. I am one of the plaintiffs in the lawsuit, *SILAS J. ALEXANDER, ET AL., VS. CHICAGO PARK DISTRICT, ET AL.*

2. I am informed and believe, and based on such information and belief, allege that the HONORABLE JUDGE GEORGE N. LEIGHTON, the judge before whom this cause is pending, has a personal bias or prejudice against me, or a bias in favor of the defendants herein.

3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of EARL B. DICKERSON, LAWRENCE KENNON, FAITH RICH, and TIMUEL BLACK which are attached hereto and made a part hereof.

BY: /s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10th day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

CERTIFICATE OF COUNSEL

I, RUFUS COOK, lead counsel herein, in accordance with the provisions of Title 28, U.S.C. Section 144 hereby state that this Motion and the Affidavits in support thereof, and this Certificate of Counsel are all made in good faith.

BY: /s/ Rufus Cook
Rufus Cook

SUBSCRIBED AND SWORN TO
before me this 10th day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs. No. 79 C 2242

CHICAGO PARK DISTRICT, et al.,

Defendants.

AFFIDAVIT

I, EARL B. DICKERSON, being first duly sworn, do hereby depose and say:

1. I am a black lawyer licensed to practice in Illinois, residing at 4800 South Lake Shore Drive. I graduated with the A. B. Degree from the University of Illinois in 1914, and enrolled in the University of Chicago Law School. After service in the American Expeditionary Force in Europe during the First World War, I returned to the University of Chicago Law School, where I graduated in 1920, and was admitted in the same year to the Illinois Bar. I began the practice of law in Chicago in 1920, and in that year also became General Counsel of the Supreme Life Insurance Company. In October, 1955 I was elected President and Chief Executive Officer of Supreme Life, which positions I held until 1971, when I became Chairman of the Board of Directors, in which position I served until January, 1973 when, upon retirement, I became Honorary Chairman of the Board.

In the years from 1920 down to the present day, I have been active in matters having to do with civil rights. I served as a member and acting chairman of President Roosevelt's first Fair Employment Practices Commission in 1940. I have served as President of the National Lawyers' Guild, and as Chairman

of the Board of Directors of the Chicago Urban League. I was for more than 25 years, beginning about 1937, a member of the National Board of Directors of the National Association for the Advancement of Colored People. I was Chairman of and worked with the Legal Redress Committee of the Chicago Branch, N.A.A.C.P. during the decades of the 1930's, 1940's, and into the 1950's. I was counsel in the case of *Hansberry* v. *Lee*, in which the United States Supreme Court struck down restrictive racial covenants in housing. I served as counsel in numerous other cases brought by or on behalf of the N.A.A.C.P. in Chicago and elsewhere.

2. During 1957, Mr. Theodore Jones served under me as Vice-President and Comptroller of the Supreme Life Insurance Company and occupied an office next to mine at the Company Headquarters. As a national board member of the N.A.A.C.P. residing in Chicago, I was requested, in the fall of 1957, to recommend a person to serve as the next president of the Chicago Branch. I called Mr. Jones into my office and inquired, in the presence of the National Branch Co-ordinator, who was visiting Chicago at the time, as to whether he would be willing to serve. Mr. Jones asked to be excused for a moment, and left the room. Since he appeared to be gone for a long time, I stepped next door to his office to determine what the trouble was. I found Mr. Jones engaged in a telephone conversation with Mr. William Dawson, then Democratic Ward Committeeman of the Second Ward in Chicago. Mr. Jones, as he confirmed when the conversation was concluded, had sought and obtained the approval and support of Mr. Dawson in Mr. Jones' effort to become president of the Chicago Branch of the N.A.A.C.P.

I subsequently attended the Chicago Branch N.A.A.C.P. election held in the late fall of 1957. I observed present, there and voting a large number of members of Mr. Dawson's Second Ward Organization, who had not theretofore been

known to me to be members of the N.A.A.C.P. Mr. Jones was elected that evening as President of the Chicago Branch of the N.A.A.C.P.

FURTHER AFFIANT SAYETH NOT.

/s/ Earl B. Dickerson
Earl B. Dickerson

SUBSCRIBED AND SWORN TO
before me this 28th day
of October, 1982

/s/ Agnes F. Hales
Notary Public

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

SILAS J. ALEXANDER, et al.,

Plaintiffs,

vs. No. 79 C 2242

CHICAGO PARK DISTRICT, et al.,

Defendants.

AFFIDAVIT

I, FAITH RICH, being first duly sworn, do hereby depose and say:

1. I have been a member of the National Association for the Advancement of Colored People continuously since 1945. I received the B. A. Degree from the University of Vermont in 1928, and the Ph.D. Degree from Bryn Mawr College in 1934. I am presently retired from employment with the Chicago Board of Education.

2. For several years prior to 1957 I worked with the west side and north side units of the N.A.A.C.P., and with the Chicago Branch, concerning myself in particular with matters related to education. From 1945 through 1957 I worked with the city-wide education committee of the Chicago Branch and, during 1955 to 1957, the north side unit to produce a study entitled *De Facto Segregation in Chicago Public Schools*, which was issued by the Chicago Branch of the N.A.A.C.P. in 1957, prior to the election of Theodore Jones to the presidency of the Chicago Branch in late fall, 1957. Two pertinent pages of that study are attached to this Affidavit. The study, together with data obtained by the north side unit, supplied the basis for the Chicago Branch N.A.A.C.P. and its north side unit to confront the Chicago Board of Education and the City of Chicago, and

to challenge their published plans for construction and pupil assigment activities which would increase, rather than decrease, segregation in the school system, and particularly on the north side of Chicago. I was personally involved in communications conducted with the Board of Education and the City in 1956 and 1957 based on the matters substantiated in the study. Those communications were, through 1957, conducted by the north side unit with the active support of the Chicago Branch of the N.A.A.C.P., and had, by December, 1957, progressed to the point where the N.A.A.C.P.'s representatives, including myself, and the representatives of the City and the Board of Education, were tentatively prepared to agree on alternative plans to those which the N.A.A.C.P. opposed.

After Mr. Jones was elected president of the Chicago Branch and took office in January, 1958, the support of the Chicago Branch for continued activity in this area was withdrawn. When the north side unit sought to continue the effort, Mr. Jones moved to abolish the unit. The Chicago Board of Education then proceeded to abandon the negotiations and to implement its original plans.

In or about 1967, several years after Mr. Jones' term had ended, the National Office of the N.A.A.C.P. authorized the establishment of three coequal Chicago Branches—the south side, the west side and the north side.

FURTHER AFFIANT SAYETH NOT.

/s/ Faith Rich
Faith Rich (Dr.)

SUBSCRIBED AND SWORN TO
before me this 29th day
of October, 1982

/s/ Lillian Schean
Notary Public

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

SILAS J. ALEXANDER, et al.,
Plaintiffs,

vs. No. 79 C 2242

CHICAGO PARK DISTRICT, et al.,
Defendants.

AFFIDAVIT

I, LAWRENCE KENNON, being first duly sworn, do hereby depose and say:

1. I am a lawyer licensed to practice in the state of Illinois, having been admitted to the bar in 1956 after having received the B.S. and J.D. Degrees from De Paul University. I am presently a partner in the law firm of WASHINGTON, KENNON, HUNTER and SAMUELS, located at 2600 South Michigan, Chicago, Illinois.

In the years from 1946 to the present day I have been involved and active in the civil rights movement. I have been a member since 1946 of the Chicago Branch of the National Association for the Advancement of Colored People. I was an Assistant State's Attorney of Cook County from 1957 to 1961, at the end of which time I participated in forming the law firm of which I am presently a partner. During the years since 1957, I have represented individuals and organizations involved in the civil rights struggle, including the N.A.A.C.P., the Co-Ordinating Council of Community Organizations, the Mississippi Freedom Democratic Party, the Afro-American Patrolman's League, the American Civil Liberties Union, and others.

2. I attended the meeting held in the fall of 1957, when Theodore Jones was elected President of the Chicago Branch, N.A.A.C.P. Prior to Mr. Jones' election, the Chicago Branch and northside, westside and Hyde Park units were actively involved in pursuing civil rights matters in their respective spheres, of which several entailed challenges of various types to actions taken by the Democratic Party and/or the City of Chicago. Prior to 1958 the units were the action arms of the Chicago Branch of the N.A.A.C.P., and were for several years the sources through which the Chicago Branch gathered data from which to identify areas for action and, once such areas were identified, the units were the primary source of local manpower and talent for addressing whatever problem was to be addressed. The Chicago Branch itself served as the headquarters, the central governing body and, through its Legal Redress Committee, as the mechanism through which the legal initiatives were taken on behalf of blacks in Chicago. When the Legal Redress Committee was chaired by Earl B. Dickerson and his successors, the administration of the Chicago Branch was not directly connected to the Chicago Democratic Party. The principal thrust of the Chicago Branch at that time, prior to 1957, was in the area of utilizing the units or their equivalents, on the one hand, for data-gathering, issue identification, and direct action, utilizing the Branch and its Legal Redress Committee, on the other hand, for co-ordination and vindication of the rights of black people in the courts.

I was Adult Advisor to the westside youth council of the N.A.A.C.P. in 1957, 1958 and 1959. Immediately prior to the election of Theodore Jones, prominent among the matters with which the westside unit and its youth council were concerned were:

(a) Protest and planned legal action against racial discrimination fostered by the Chicago Board of Education and then Superintendent Benjamin Willis, and the City of Chicago.

(b) Charges of discrimination and planned legal action against the City of Chicago and the Chicago Board of Education for fostering and failing to combat discrimination in the labor unions supplying tradesmen to city agencies and to the Chicago Board of Education.

(c) Demonstrations and protests against the racially discriminatory policies of the Chicago Park District.

With respect to the Chicago Park District in particular, one of the defendants in the litigation in which this Affidavit is submitted, the westside unit and its youth council were involved during the summer of 1958 with demonstrations and protests against the District triggered by the beatings by whites of several blacks who had sought to use the facilities at Rainbow Beach, then a segregated beach located at and south of 75th Street. We charged the Park District, among other things, with maintaining racially segregated facilities and failing to provide protection to black persons seeking to use facilities traditionally used by whites.

During 1957 the N.A.A.C.P. westside unit, its westside youth council and other N.A.A.C.P. units were supported by the Chicago Branch in the principal activities outlined above, having to do with the City of Chicago and the Chicago Board of Education and schools discrimination, and the City of Chicago, the Board of Education, and labor union discrimination. In the year 1957 the administration of the Chicago Branch N.A.A.C.P. was headed principally by persons having no apparent ties to the Chicago Democratic Party.

After the election of Theodore Jones in late fall of 1957, support of the Chicago Branch for the activities of the westside unit was withdrawn. Mr. Jones' election, on information and belief, was made possible by an agreement made between himself and William Dawson, under which certain activities of the Chicago Branch N.A.A.C.P. were to be discontinued by

Jones and this administration in exchange for which Jones and his administration were to receive the support of Dawson and the Democratic Organization. Mr. Dawson was at that time Ward Committeeman of the 2nd Ward Regular Democratic Organization, and the publicly acknowledged leader of the 3rd, 4th, and 20th Wards. Mr. Jones named as his administration's Chairman of the Legal Redress Committee of the Chicago Branch, and legal adviser to the president, George Leighton, who, on information and belief, was also connected to the Democratic Organization in that he had been President of the Third Ward Regular Democratic Organization, and continued to be active in the Chicago Democratic Organization.

During 1958, after Mr. Jones' election, the activities of the westside unit detailed above received virtually no support from the Chicago Branch. The process of withdrawal of support by the Jones administration, which included George Leighton as legal counsel, resulted in a number of challenges being made from time to time in N.A.A.C.P. meetings to the legality and propriety of actions taken by the Jones administration. These challenges were often referred to and decided in those meetings by George Leighton, whose opinions consistently favored whatever position had been taken by Mr. Jones.

In August, 1958, Theodore Jones moved to abolish the units of the Chicago Branch. Almost simultaneously, and contrary to the by-laws and rules of the organization, he (1) illegally increased the 35-member Executive Committee by 5 persons, (2) illegally "authorized" those 5 newly-appointed persons to vote on the issue of abolition of the units; (3) illegally failed to provide notice to the units or their chairmen of the action to be taken, thus refusing to afford them an opportunity to be heard. Challenges made to the legality of these actions were rebuffed, based in part on legal opinions supplied by George Leighton.

Before the illegal and improper actions to be taken by the Jones administration were made known to the membership,

Mr. Jones caused to be published in Chicago and national publications statements to the effect that the units were to be abolished to rid the N.A.A.C.P. of "communist influences." No evidence was ever produced to support that allegation regarding a single person and, to the best of my knowledge, not one of the persons active in the units was then or has since been in any way shown to have been subject to any such influence. By making that completely unfounded public accusation, however, for which he had no authority from the Board of Directors, Mr. Jones and his administration dealt a grievous blow to the Chicago N.A.A.C.P., and cast aspersions on the character and reputation of persons who were never afforded the opportunity to defend themselves, and who were ousted from the organization by means of procedures rife with irregularities.

During the two years of Mr. Jones' Presidency, the Chicago Branch N.A.A.C.P. effectively abandoned opposition to the discriminatory policies of the City of Chicago and the Chicago Board of Education, and the president abandoned support for the efforts then being made to fight the discriminatory practices of the Chicago Park District. Leadership in these areas was largely assumed by an organization called the Co-Ordinating Council of Community Organizations, formed in part to fill the void left by the inaction of the Chicago Branch N.A.A.C.P. during Mr. Jones' administration. During this period, I am aware of no initiatives taken by the organization or its Leal Redress Committee, chaired by George Leighton, to challenge the discriminatory policies of the City of Chicago or the Chicago Board of Education.

Far from supporting and furthering the interests of black people, the two-year administration of Theodore Jones resulted in acts consistently inimical to the interests of black people, including abandonment of the initiatives theretofore begun against agencies of local government, violation of the by-laws and rules of the organization, abolition of the units, and a

cessation of the traditional role of the Legal Redress Committee—vindication of the legal rights of blacks. I, and many others who were active in the Chicago Branch N.A.A.C.P. and its units during 1957-1959, seriously dispute the credibility of Theodore Jones and those in power during his administration as persons seriously concerned with furthering the interests of black people.

FURTHER AFFIANT SAYETH NOT.

/s/ Lawrence Kennon
Lawrence Kennon

SUBSCRIBED AND SWORN TO
before me this 3 day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

SILAS J. ALEXANDER, Et. Al.,
Plaintiffs,

vs. No. 79 C 2242

CHICAGO PARK DISTRICT, Et Al.,
Defendants.

AFFIDAVIT

I, TIMUEL D. BLACK, being first duly sworn, hereby depose and say:

1. I am a resident of Chicago, Illinois. I received the B.A. Degree from Roosevelt University in 1952, and the M.A. Degree from the University of Chicago in 1954, after which time I completed all classwork requirements for the PH.D Degree in Educational Administration at the University of Chicago. I have taught in the public schools of Gary, Indiana and Chicago, Illinois. I served as Assistant Director of the National Teacher Corps, and have served as a Dean with the City Colleges of Chicago, as Vice President of Academic Affairs at Olive-Harvey College, and as Director of Community Affairs for the City Colleges of Chicago. I am currently serving as full Professor of Social Sciences at Loop College.

I have served and presently serve as a member of the Board of Directors and the Executive Committee of the Chicago Branch of the American Civil Liberties Union; as a member of the National Board of Directors of Americans for Democratic Action; as Board Member of the Independent Voters of Illinois; as Vice-President of the Chicago-Area Alliance of Black School Educators, and as a member of the Board of Directors of Friends of The Parks.

I have read the Affidavit signed by Lawrence Kennon relative to this litigation. I have personal knowledge of the events described on pages 2 through 7 thereof, and would testify to substantially the same effect if I were called as a witness in the case.

I also attended the fall, 1957 meeting of the Chicago Branch N.A.A.C.P. at which Theodore Jones was elected president. Aside from precinct workers and captains from the Second Ward Organization of which William Dawson was committeeman, I saw precinct captains and workers from the 3rd, 4th and 20th Wards, all at that time publicly acknowledged to be under the leadership of William Dawson.

In addition to the matters related in the Kennon Affidavit, I was one of several persons who sought, while Theodore Jones was President and George Leighton was Legal Redress Committee Chairman of the Chicago Branch N.A.A.C.P. to have the organization fulfill one of its traditional roles by moving legally against the City of Chicago and the Chicago Board of Education to remedy discrimination against blacks. In particular, in 1957 and 1958 we sought, in the wake of the decision of the United States Supreme Court in Brown v. Board of Education, to have the N.A.A.C.P. Legal Redress Committee seek the cessation of segregation in the Chicago Public Schools. We were rebuffed by Mr. Leighton and Mr. Jones.

I and others also sought in 1957 and 1958 to have the N.A.A.C.P. and the Legal Redress Committee press the City of Chicago legally on the issue of housing segregation. Again, we were refused by Mr. Leighton and Mr. Jones.

The events surrounding the election of Mr. Jones in 1957 and, with respect to matters involving any challenge to City Government and/or the Democratic Party, the subsequent inaction of the N.A.A.C.P. and its Legal Redress Committee, were the result of a deal whereby the Chicago Branch N.A.A.C.P. became a captive of the Democratic Party. The

actions taken by Theodore Jones and George Leighton during 1957, 1958 and 1959 pitted the leadership of the Organization against its members, and were opposed to the interests of black people and the Organization itself. On the basis of the events known to me, neither of those individuals possesses any credibility as a spokesman for the interests of black people. Mr. Jones' actions as a member of the Board of Commissioners of the Chicago Park District, which I have observed, are consistent with the actions and positions taken by him in 1957-59 in the N.A.A.C.P., where, as with the Park District, he and George Leighton served the interests of the Cook County Democratic Party.

FURTHER AFFIANT SAYETH NOT.

/s/ Timuel D. Black
Timuel D. Black

SUBSCRIBED AND SWORN TO
before me this 3rd day
of November, 1982

/s/ Lillian Schean
Notary Public

[Memorandum Of Law Was Not Included]

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

SILAS J. ALEXANDER, Et Al.,
Plaintiffs,

vs. No: 79 C 2242

CHICAGO PARK DISTRICT, Et Al.,
Defendants.

MOTION FOR DISQUALIFICATION OF JUDGE PURSUANT TO 28 U.S.C. SECTION 455 (a)

Plaintiff, RENEE' BRADFORD, shows that the HONORABLE JUDGE GEORGE N. LEIGHTON, is disqualified from presiding as judge at the trial of the above-numbered and entitled cause under the provisions of 28 U.S.C., Section 455(a) because his impartiality might reasonably be questioned, as more fully set forth in the affidavit attached hereto and made a part hereof.

Wherefore, plaintiff, RENEE' BRADFORD, moves that the HONORABLE JUDGE GEORGE N. LEIGHTON declare himself disqualified to sit on the hearing of this cause and that another judge be assigned to hear motion and action.

/s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10th day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

STATE OF ILLINOIS
COUNTY OF COOK } ss.:

AFFIDAVIT IN SUPPORT OF MOTION FOR DISQUALIFICATION OF JUDGE PURSUANT TO TITLE 28 U.S.C. SECTION 455(a)

I, RENEE' BRADFORD, being duly sworn say:

1. I am one of the plaintiffs in the lawsuit, *SILAS J. ALEXANDER, ET AL.*, v. *CHICAGO PARK DISTRICT, ET AL.*

2. I am informed and believe, and based on such information and belief, allege that JUDGE GEORGE N. LEIGHTON'S "impartiality might reasonably be questioned", and he is therefore disqualified to act in this cause under the provisions of Title 28, U.S.C. Section 455(a).

3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the Affidavits of EARL B. DICKERSON, FAITH RICH, LAWRENCE KENNON and TIMUEL BLACK which are attached hereto, incorporated by reference herein and made a part hereof.

/s/ Renee' Bradford
Plaintiff, RENEE' BRADFORD

SUBSCRIBED AND SWORN TO
before me this 10 day
of November, 1982

/s/ Aldus S. Mitchell
Notary Public

[REFER TO AFFIDAVITS SUPPORTING § 144 MOTION SET FORTH AS EXHIBIT 3A]

[MEMORANDUM OF LAW NOT INCLUDED]

APPENDIX 5

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 79 C 2242 Date January 7, 1983

Title of Cause Silas J. Alexander, et al. v. Chicago Park District, et al

Brief Statement of Motion Order ruling on motions to transfer disqualification proceedings and to recuse the court under 28 U.S.C. Sections 144 and 455(a)

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (seperate lists may be appended).

Names and Addresses of moving counsel _____

_____

_____

Representing _____

_____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent. _____

_____

_____

The motions of plaintiff Renee Bradford for transfer of disqualification proceedings to another judge of this court, and to recuse the court pursuant to 28 U.S.C. Sections 144 and 455(a) are denied for the reasons stated in the Memorandum filed herewith.

Leighton, *J.*

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

SILAS J. ALEXANDER, et al., *Plaintiffs,* *vs.* CHICAGO PARK DISTRICT, et al., *Defendants.*	No. 79 C 2242 Before the Honorable George N. Leighton United States District Judge

Memorandum

Relying on 28 U.S.C. §§ 144 and 455(a), Renee Bradford, one of 35 Negro and Hispanic plaintiffs in this class suit, has filed two motions seeking to disqualify the court from further participation in this case. Briefs and memoranda have been filed; and from the contentions of the parties, two issues are presented. First, whether under the circumstances of this case, the disqualification motions should be transferred for hearing to another judge of this court. Second, if there is no transfer, whether the affidavits in support of the motions are legally sufficient and timely.

After considering the question of transfer, the motions, the affidavits supporting them, the record of these proceedings, and applying the controlling principles of law, this court concludes that transfer of the disqualification motions to another judge of this court is not warranted; and that the affidavits are neither timely nor sufficient. Therefore, for the following reasons, the motions to transfer and to disqualify the court are denied.

I.

This suit was filed on June 1, 1979 by Dorothy Ware, as the sole plaintiff. Suing under 42 U.S.C. §§ 1983 and 1988, she alleged in a three-count complaint that the defendants Chicago

Park District, its Attorney and Agent, its Commissioners from 1976 to 1979, and its General Superintendent, were liable for the deceit and fraud that deprived her of property interests in a certificate of sale assigned to her by the purchaser at a foreclosure of delinquent real estate taxes. Ms. Ware alleged that the real estate in question was a walled vacant lot at 5017 South Ellis Avenue in the city of Chicago that had a value of $350,000. She did not purport to represent a class; nor did she allege any of racial other invidious discrimination by defendants. She prayed for injunctive relief, damages actual and punitive, and attorney's fees. The lawyer who filed her suit was Mr. Rufus Cook, who had also represented her in the state court proceedings which she described as a bitter and acrimonious dispute. Summons issued, defendants were personally served, they appeared, moved for and obtained an extension until July 5, 1979 to answer or otherwise plead to the complaint.

Before any defendant had answered, the amended complaint which is now the pleading in this case was filed. Silas J. Alexander was the lead plaintiff; Dorothy Ware and Renee Bradford were among the other 34 Negroes and Hispanics who alleged they were suing on behalf of themselves and others similarly situated, "all individual black, Latino or poor residents of the City of Chicago." In Counts I through IV and VII, plaintiffs alleged race discrimination in the allocation of Chicago Park District resources by defendants, race discrimination in employment practices in park district facilities, and race discrimination in the availability to Negroes and Hispanics of adequate protection in parks administered by defendants. They said that their claims arose under the Fourteenth Amendment to the Constitution of the United States, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000(a), *et. seq.*, and 42 U.S.C. § 1983. In Counts V and VI, Ms. Ware restated the claims she had made in her earlier complaint; the defendants were the same ones she had originally named with the addition of two Commissioners who had taken office early in 1979.

Thereafter, the parties proceeded with pretrial motions. Plaintiffs moved for class certification, with defined subclasses. Defendants moved to dismiss the amended complaint. The motions were set on briefing schedules, with an order that stayed discovery to await the court's rulings. Ultimately, defendants' motion was granted only as to the counts in which Dorothy Ware reasserted the claims she had made in her original complaint; thus, Counts I through IV and VII of the amended complaint remained for defendants to answer. Over defendants' strenuous and persistent objections, plaintiffs' motion to certify the class, and define subclasses, was granted. The case then entered the stage of discovery proceedings.

The discovery demands of the parties on one another began on July 30, 1979. Interrogatories were filed under the rules; motions for production of documents were made. Motions to compel production and answers were cross-filed. The intensity of the discovery disagreements required the court to refer these pretrial matters to a magistrate. This was done; and later, status reports were made to the court. An appeal from a ruling of the magistrate was taken to this court by defendants; and after hearing the parties, the magistrate's ruling which awarded plaintiffs attorney's fees in one of the discovery disputes was affirmed.

On December 2, 1981, plaintiffs filed a verified motion for a preliminary injunction in which they asked this court to immediately restrain and enjoin defendants from adopting or seeking to adopt any budget, plan or scheme for the expenditure of public funds used for park purposes which fails to provide for substantially equal allocation of funds "to park facilities without regard to race, color or ethnic derivation of the users of the park facilities, or of the persons resident in the neighborhoods wherein the said facilities are located." They prayed for an injunction restraining defendants from adopting any plan or scheme for the expenditure of public funds which "fails to show on a per park basis the sums to be expended, in such fashion as to omit determination of whether and to what

extent black and Latino parks are discriminated against in terms of allocation of funds, in violation of the fourteenth amendment to the Constitution of the United States and the Illinois Constitution [sic]."

Defendants objected to the motion. They argued that plaintiffs had filed their amended complaint in July 1979; that defendants, without any action by plaintiffs, had adopted budgets for the years 1980 and 1981; that the park district's 1982 budget was scheduled for public hearing on December 10, 1981, and was scheduled for consideration by its Commissioners on or before December 22. Therefore, defendants insisted that plaintiffs' motion for a preliminary injunction was not timely and did not deserve a hearing.

This court overruled defendant's objections and set the motion for a day certain. The hearing began on December 29, 1981. Three days were devoted to the taking of evidence; and at the end of that period, counsel for the plaintiffs requested that the matter be continued to allow presentation of other evidence, including a witness who had to travel a great distance in order to appear before this court. The request was granted, the matter was continued; and then, for various reasons, some a conflict in this court's trial schedule, others the inability of either plaintiffs' counsel or counsel for defendants to be in court, the hearing extended over seven additional court sessions. When plaintiffs rested their case in chief, defendants moved for a direct finding in their favor; this court denied the motion and required them to introduce evidence.

One of the defendants in this case is Mr. Theodore Jones who until early in 1979 was a Chicago Park District Commissioner. He is a Negro, well-known in Chicago as a businessman who for many years has been active in the civic affairs of the Negro community of the city. This judge, when he was a practicing lawyer and also active in the civic affairs of Chicago, became acquainted with Mr. Jones. In a general way, they

were co-workers in many civic activities, all having as their purpose the eradication of racism in the life of the American Negro in the city of Chicago.

On perhaps two social occasions, this judge and his wife visited the home of Mr. and Mrs. Jones. In 1957 and 1958, Mr. Jones was elected president of the Chicago Branch, National Association for the Advancement of Colored People. It is well known that in both state and federal levels, Mr. Jones has worked in and with private organizations and public agencies whose aims are the prohibition and elimination of race discrimination against Negroes in work opportunities.

When the lawyers for the parties informed the court that they were about to conclude presentation of evidence in the preliminary injunction proceedings, it inquired if either of them was going to call Mr. Jones as a witness. Both parties disclosed that they did not intend to call him. The court, for the record, revealed its acquaintance with Mr. Jones and expressed the desire to hear from him. Because he was a Chicago park district Commissioner, a citizen who has been active in the Negro community of Chicago, this court believed that Mr. Jones' testimony would assist it in resolving the controversy presented by plaintiffs' motion for a preliminary injunction. As a consequence of the court's colloquy with counsel, Mr. Jones was informed about the court's request and he appeared. He was initially questioned by the court. His testimony covered his personal background and his knowledge of the policies of the Chicago Park District.

Then, after hearing all the evidence which the parties had to offer, and making scheduling accommodations for them, the court heard their counsel in oral argument. It invited them to propose findings of fact, suggest conclusions of law, and support their respective positions with post-trial briefs. The matter was set for ruling; and on September 30, 1982 the court made its findings of fact, and reached its conclusions of law.

One of the findings was that:

> Theodore Jones was called as the court's witness. During his tenure as a [Park District] Commissioner, Mr. Jones attended most meetings of the Park District Board. He is personally familiar with several parks. With respect to personnel, he initiated and won approval of an affirmative action employment program. He testified concerning the responsiveness of the Park District Board to his suggestions which included capital improvements at the South Shore Country Club and Jackson Park, a golf driving range on the South Side, funding for the DeSable Museum of African American History, and work at the 31st Street Beach.

Concerning these facts, the court concluded, in part, that:

> [In his testimony Mr. Jones] would have disclosed, as candidly as he testified, any basis that would support the plaintiffs in this case. He did not. Taking his testimony, together with all the other evidence this court has heard, the court is satisfied that there is very little likelihood of plaintiffs succeeding on the merits at trial in this case.

Accordingly, plaintiffs' motion for preliminary injunctive relief was denied.

Renee Bradford was not a witness during the preliminary injunction proceedings; nor did she appear in court either before or during the hearing of the motion. She has never been before this court; and her affidavits do not contain any averment which would show that she personally knows this judge, or that he knows her. She does not claim any experience from which it could reasonably be inferred that this judge has ever had the occasion to manifest any feeling of prejudice toward her personally. It does not appear either from any affidavit, claim, or reference to any portion of the record, that this judge has ever said anything to or about Ms. Bradford.

However, on November 12, 1982, she filed a motion for disqualification of judge due to bias or prejudice pursuant to 28 U.S.C. § 144, saying that the court "has a personal bias or

prejudice against her, or bias in favor of the defendants herein." She moved that this court "proceed no further herein and that another judge be assigned to both hear this motion and the subsequent proceedings herein." On the same day, she filed a motion for disqualification of judge pursuant to 28 U.S.C. § 455(a) saying that this judge is disqualified from presiding at the trial of the above-numbered and entitled cause "under the provisions of 28 U.S.C. § 455(a) because his impartiality might reasonably be questioned, as more fully set forth in the affidavit attached hereto and made a part hereof." She moved that this judge "declare himself disqualified to sit on the hearing of this cause and that another judge be assigned to hear this motion and action." The affidavit supporting her Section 144 motion is as follows:

> I, Renee Bradford, being duly sworn, say:
>
> 1. I am one of the plaintiffs in the lawsuit, *Silas J. Alexander, et al v. Chicago Park District, et al.*
>
> 2. I am informed and believe, and based on such information and believe, allege that the Honorable George N. Leighton, the judge before whom this cause is pending, has a personal bias or prejudice against me, or a bias in favor of the defendants herein.
>
> 3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of Earl B. Dickerson, Lawrence Kennon, Faith Rich, and Timuel Black, which are attached hereto and made a part hereof.

The following is her affidavit in support of the motion under 28 U.S.C § 455(a):

> I, Renee Bradord, being duly sworn, say:
>
> 1. I am one of the plaintiffs in the lawsuit, *Silas J. Alexander, et al. v. Chicago Park District, et al.*
>
> 2. I am informed and believe, and based on such information and belief, allege that Judge George N. Leighton's 'impartiality might reasonably be questioned', and he is therefore disqualified to act in this cause under the provisions of Title 28, U.S.C. § 455(a).

3. The facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of Earl B. Dickerson, Faith Rich, Lawrence Kennon and Timuel Black, which are attached hereto, incorporated by reference herein and made a part hereof.

II

A

We begin with the observation that the mere filing of an affidavit of prejudice does not require a judge to recuse himself. On the contrary, a judge has the affirmative duty to inquire into the legal sufficiency of such an affidavit and not disqualify himself unnecessarily, particularly, where the request for disqualification was not made at the threshhold of the litigation and the judge has acquired valuable background of experiences with the case. *National Auto Brokers v. General Motors Corporation*, 572 F.2d 953, 958 (2d Cir. 1978); *Raitfort v. Bradley*, 446 F.Supp. 129, 130 (E.D. Pa. 1978).

It has been said by an able and experienced district judge of this circuit that "[w]hen a party has filed an affidavit alleging personal bias or prejudice on the part of a judge before whom a matter is pending, that judge has the obligation to determine the legal sufficiency of the affidavit because only '[h]e knows fully his own thoughts and feelings in the complete context of facts alleged.'" *Matter of Searches Conducted on March 5, 1980*, 497 F.Supp. 1283, 1287 (E.D. Wis. 1980), quoting Sirica, J., in *United States v. Mitchell*, 377 F.Supp. 1312 at 1315 (D. D.C. 1974). Consistent with this statement, our court of appeals has held that when a district judge is presented with a motion asking for his recusal, he is "entitled to pass upon the sufficiency of the affidavit, but, of necessity, all factual allegations [have] to be taken as true." *Action Realty Co. v. Will*, 427 F.2d 843, 844 (7th Cir. 1970); see *Berger v. United States*, 255 U.S. 22, 32 (1921). And recently, Judge Aspen of this court had occasion to say that "[a]lthough judges have, on occasion, referred the question of their own disqualification to

another judge for disposition, we think the better procedure in this case is for the judge presiding over the case to resolve the motion for disqualification since [he is] in the best position to appreciate the circumstances surrounding the allegations in the affidavits." *U. S. v. Professional Air Traffic Controllers Org.*, 527 F.Supp. 1344, 1352 (N.D. Ill. 1981).

In what is perhaps the latest word on this subject uttered by any federal court of appeals, the Fifth Circuit, in *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1162 (5th Cir. 1982), pointed out that "[t]he challenged judge is most familiar with the alleged bias or conflict of interest. He is in the best position to protect the nonmoving parties from dilatory tactics." Then, calling attention to *United States v. Haldeman*, 559 F.2d 31, 131 (D.C. Cir. 1976) for the proposition that submitting recusal motions to fellow judges for decision is at most permissive, the court went on to say that "[r]eferring the motion to another judge raises problems of administrative inconvenience and delay."

This court agrees. Plaintiffs' case has been on this court's docket since June 1, 1979. In the period of about two and a half years, during which hundreds of orders have been entered, a preliminary injunction motion has been heard, the court has acquired a valuable background of experience concerning the case. It now understands the plaintiffs' theories and the contentions made on their behalf by their lawyers. More importantly, the court knows and understands, at least so it believes, the lead lawyer for the plaintiffs, Mr. Rufus Cook. From his demeanor in court, his attitude, and what he has said orally and in writing, the court has gained the distinct feeling that he harbors an intense hatred for the defendants and the lawyers who represent them. Defendants' lawyers, on the other hand, never seem to miss an opportunity to respond to Mr. Cook, in kind, and displaying their own brand of his attitude. This court fully knows its thoughts and feelings about the

plaintiffs, the defendants, and the context of the facts alleged in the affidavits filed in support of the recusal motions. It knows the duty owed to all the parties to see that dilatory tactics not be condoned, that problems of administrative inconvenience not be raised, and that the case proceed to trial so that justice will be done in accordance with the law and the evidence.

Under these circumstances, it would be judicial cowardice of the first order for this court, as moved by plaintiff Renee Bradford in her two motions, "to proceed no further herein and that another judge be assigned to hear these motions. . . ." Therefore, the disqualification motions will not be transferred to another judge; instead, this court will discharge its duty and proceed to determine the timeliness and legal sufficiency of the affidavits filed in support of the motions to recuse. *United States v. Azhocar,* 581 F.2d 735, 738 (9th Cir. 1978); *Action Realty Co. v. Will,* 427 F.2d 843, 844 (7th Cir. 1970); Wright, Miller & Cooper, Federal Practice and Procedure §3551.

B

As to the question of timeliness, it should be noticed that when Congress gave a party in a district court proceeding the right to move for the recusal of a judge, the first obligation it imposed on the movant was that he file "a timely. . .affidavit." See Act Mar. 3, 1911 c. 231, §31, 36 stat. 1090; 1949 U.S.Code Cong. Service p.1248; 28 U.S.C. §1944. It is now settled that this time requirement applies with equal force to a motion under 28 U.S.C. §455(a). *In re: International Business Machines Corp.,* 618 F.2d 923, 932 (2d Cir. 1980); *City of Cleveland v. Cleveland Elec. Illuminating Co.,* 503 F.Supp. 368, 379 (N.D. Ohio 1980). Its purpose is to prevent litigants from abusing motions to disqualify, using them as dilatory tactics, or as means to sample the temper of the court before deciding whether to raise an issue of disqualification. *Peckham v. Ronrico Corp.,* 288 F.2d 841, 843 (1st Cir. 1961); see 48A C.J.S. Judges §136.

Section 144 provides that the affidavit "shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard. . . ." This provision, however, is no longer pertinent because terms in federal district courts have been abolished, although the procedure still requires that an affidavit be timely filed. *Smith v. Danvo*, 441 F.Supp. 171, 175 (N.D. Pa. 1977). And whenever the question is raised, the inquiry into timeliness, either under Section 144 or Section 455(a), is concerned with the movant's reasonable diligence in filing the affidavit. *Samuel v. University of Pittsburgh*, 395 F.Supp. 1275, 1279 (W.D. Pa. 1975), *vacated on other grounds*, 538 F.2d 991 (3d Cir. 1976). An affidavit is untimely under either statute if the affiant, after knowldege of facts showing supposed bias, has invoked or sought to invoke the court's affirmative action on his behalf before claiming prejudice on the part of the judge. "If the alleged information upon which the Motion for Disqualification is based was known or knowable to the movant a considerable period of time prior to the Motion, then such Motion is untimely." *Rademacher v. City of Phoenix*, 442 F.Supp. 27, 29 (D. Ariz. 1977). For, as our court of appeals has said, "one must raise the disqualification of the judge at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification. *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976).

The records of this case show that on September 3, 1982, the day Mr. Jones testified, Ms. Bradford's lead counsel, Mr. Rufus Cook was in court. This judge, candidly and fully, disclosed his acquaintance with Mr. Jones and revealed the importance he attached to the testimony he was about to hear. The findings of fact and conclusions of law filed on September 30 merely formalized what the court stated from the bench. And certainly, on September 3, Ms. Bradford and her lawyer Mr. Cook knew or should have known every detail of the facts stated in the affidavits of Messrs. Dickerson, Kennon, Black, and in that of Ms. Rich because what these affiants recite were

matters of common knowledge in the Negro community of Chicago, and many of these facts were reported in Chicago newspapers, and some can be found in public records. For these reasons, it is specious to argue, as Mr. Cook does on Ms. Bradford's behalf, that the significance of the facts attested to by the affiants were not known until "after the transcript of the relevant court in order to know commonly known facts and what is revealed to him, in open court, by a presiding judge. But more importantly, this argument does not explain why Ms. Bradford waited until November 12, 1982, more than two months after the relevant facts were either known or knowable to her, before she filed her motions for disqualification of the court. The really honest explanation is that Ms. Bradford and her lawyer, all the facts being known or knowable to them on September 3, 1982, waited until this court denied plaintiffs' motion for a preliminary injunction on September 30, 1982, and then filed the motions to recuse.

A litigant should not be permitted to use disqualification motions as a means of "sampling the temper of the court before deciding whether or not to file an affidavit of prejudice. . . ." *Peckham v. Ronrico Corporation*, 288 F.2d 841, 843 (1st Cir. 1961). "One of the reasons for requiring promptness in filing the affidavit is that a party, knowing of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes subsequent treatment that he receives." *In re United Shoe Machinery Corporation*, 276 F.2d 77, 79 (1st Cir. 1960). *In City of Cleveland v. Cleveland Elec. Illuminating Co.*, 503 F.Supp. 368 (N.D. Ohio 1980), the court, citing from another case, told the movant before it that:

> The judicial process can hardly tolerate the practice of a litigant with knowledge of circumstances suggesting possible bias or prejudice holding back, while calling upon the court for hopefully favorable rulings, and then seeking recusal when they are not forthcoming. 503 F.Supp. at 381.

Ms. Bradford must be told the same words. Her affidavits were not timely filed, and for this reason alone her motions to recuse should be denied. *United States v. International Business Machines Corp.*, 539 F.Supp. 473 (S.D. N.Y. 1982); see *Duplan Corporation v. Deering Milliken, Inc.*, 400 F.Supp. 497 (S. S.C. 1975); Annot. 24 A.L.R.Fed. 290. But there are additional reasons why her motions cannot be granted.

C

Section 144 of Title 28, United States Code, provides that:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, . . .

When faced with a motion under this statute, the court focuses on the movant's affidavit. *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982). It is well settled that the affidavit must be sworn to by a party to the action, *Giebe v. Pence*, 431 F.2d 942 (9th Cir. 1970), and not even one by counsel will meet this statutory requirement. *United States ex rel. Wilson v. Coughlin*, 472 F.2d 100, 104 (7th Cir. 1973); cf. *Paschall v. Mayone*, 454 F.Supp. 1289, 1300 (S.D. N.Y. 1978).

The affidavit must identify with particularity time, place, persons, and circumstances supporting the affiant's belief of personal bias against him or in favor of his opponent; and it must be of sufficient detail so "that the affiant would expose himself to a charge of perjury, if he were guilty of swearing to statements that he knew to be false." *Roussel v. Tidelands Capital Corp.*, 438 F.Supp. 684, 690 (N.D. Ala. 1977). This

requirement, and that it be accompanied by counsel's affidavit of good faith, are designed to protect the integrity of the judicial system and prevent abuse of the recusal procedure. *Matter of Searches Conducted on March 5, 1980*, 494 F. Supp. 1283, 1288 (E.D. Wisc. 1980).

It has been said that for alleged bias or prejudice to be sufficient to require recusal, it "must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Wilks v. Israel*, 627 F.2d 32 (7th Cir. 1980). The alleged bias or prejudice must be personal and not judicial; it must bear directly on the current proceeding. *Matter of Searches Conducted on March 5, 1980*, 497 F.Supp. 1283, 1288 (E.D. Wisc. 1980). Moreover, the facts alleged in the affidavit "must give fair support to the charge of a bent of mind that may prevent or impede partiality of judgment." *Berger v. United States*, 255 U.S. 22, 33 (1921). The standard under Section 144 is that of bias in fact. *Parish v. Board of Commissioners*, 524 F.2d 98 (5th Cir. 1975); Note, Disqualification of Federal Judges for Bias or Prejudice, 46 U.Chi.L.Rev. 236, 243 & n.37, 244 (1978).

It is obvious, from even a cursory examination of it, that the affidavit with which Ms. Bradford supports her Section 144 motion is legally insufficient. She does not describe any circumstance which would establish her claim of personal bias or prejudice by this court against her, or in favor of defendants. The affidavit consists of the bold assertion that "[t]he facts and reasons for the belief that such bias or prejudice exists are set forth in the affidavits of Earl B. Dickerson, Lawrence Kennon, Faith Rich, and Timuel Black, which are attached hereto and made a part hereof."

It happens that none of these affiants is a party to this suit, nor is it claimed they belong to the certified class. And it has been held "that the doctrine of incorporation by reference has

no place in a § 144 affidavit." *Hall v. Burkett*, 391 F.Supp. 237, 242 (W.D. Okla. 1975). This holding is mandated by the requirement that it is "a party to any proceeding in a district court. . ." who must make and file a timely and sufficient affidavit before the statute will become operative. 28 U.S.C. § 144. However, since they are being used to bring the impartiality of this court into question, it is important that these four affidavits be examined.

A substantial part of each one consists of autobiographical data which reveal the following concerning each affiant. Mr. Dickerson states that he is a Negro lawyer, a graduate of the University of Chicago Law School who, since 1920 and until January 1973, when he retired, was an insurance company executive. Throughout his professional life, he has been active in the civil rights movement. Ms. Rich is a retired Chicago Board of Education employee, holder of a doctorate from Bryn Mawr College. Since 1945, she too has been active and interested in the civil rights field, particularly with the Chicago Branch, NAACP. Mr. Kennon is a Chicago lawyer who since 1946 has been a member of the Chicago Branch, NAACP, and active with various civil rights organizations in Chicago and in other parts of the country. Mr. Black is a graduate of Roosevelt University and holds a master's degree from the University of Chicago. He is a doctoral candidate for a degree in educational administration from the University of Chicago. He has held a number of academic positions in Chicago institutions of learning, and presently is full professor of social science at Loop College.

The gist of Mr. Dickerson's affidavit is the description of a conversation that took place between him and Mr. Theodore Jones in the fall of 1957 when he, Mr. Dickerson, asked Mr. Jones if he would be willing to serve as president of the Chicago Branch, NAACP. According to Mr. Dickerson, the occasion was the presence in his office of the national branch coordinator of the NAACP. Mr. Jones asked to be excused; and when he did not return, Mr. Dickerson went to Mr. Jones' office and

found him engaged in a telephone conversation with Congressman William L. Dawson, then Democratic Committeeman of the Second Ward in Chicago. Mr. Jones told Mr. Dickerson that he had sought and obtained the approval and support of Mr. Dawson in his effort to become president of the Chicago Branch, NAACP. Subsequently, Mr. Dickerson said he attended the branch election; he saw present and voting a number of persons from Mr. Dawson's Second Ward organization who had not been known to be members of the NAACP. Mr. Dickerson concludes his rather short affidavit with the statement that "Mr. Jones was elected that evening as President of the Chicago Branch of the N.A.A.C.P."

In her affidavit, Ms. Rich describes her efforts, prior to 1957 working with the Chicago west and northside units of the NAACP, and with the Chicago Branch, particularly in matters relating to education. She states that prior to Mr. Jones' election as president of the Chicago Branch in late fall 1957, the northside unit produced a study on de facto segregation in Chicago public schools, and issued by the Chicago Branch. She says that negotiations by a committee of which she was a member with the Chicago Board of Education had proceeded to a point in December 1957 that representatives of the city of Chicago and the board of education "were tentatively prepared to agree on alternative plans to those which the N.A.A.C.P. opposed." She said that after Mr. Jones was elected and took office, the Chicago Branch withdrew its support of the activity in the area in which she had worked. When the northside unit sought to continue these efforts, says Ms. Rich, Mr. Jones moved to abolish the unit. Several years after Mr. Jones' terms ended, the national office of the NAACP authorized establishment of three co-equal Chicago Branches, the south, the west, and the northside branches.

In his affidavit, Mr. Kennon refers to the years in which he had "represented individuals and organizations involved in the civil rights struggle, including the N.A.A.C.P. . . . . ." He also

attended the Chicago Branch election meeting in the fall of 1957 when Mr. Jones was elected president. Mr. Kennon states that prior to this election, the Chicago Branch and its other units "were actively involved in pursuing civil rights matters in their respective spheres, of which several entailed challenges of various types to actions taken by the Democratic Party and/or the city of Chicago." He goes on to aver that prior to 1958 these units "were the action arms of the Chicago Branch of the N.A.A.C.P. . . ." and were for several years the source of data gathered by the Chicago Branch for actions in civil rights matters. Mr. Kennon states that "[t]he principal thrust of the Chicago Branch at that time, prior to 1957, was in the area of utilizing the units or their equivalents, on the one hand, for data gathering, issue identification, and direction action, utilizing the Branch and its Legal Redress Committee, on the other hand, for co-ordination and vindication of the rights of black people in the courts."

Mr. Kennon then continues his recital of the history of the NAACP Chicago Branch and his role as an adult adviser to the West Side Youth Council in 1957, 1958 and 1959. He refers to the Chicago Park District, one of the defendants in this case, and states that there were demonstrations and protests in the summer of 1958 "against the District triggered by the beatings by whites of several blacks who had sought to use the facilities at Rainbow Beach, then a segregated beach at the south of 75th Street." He states that "[w]e charged the Park District, among other things, with maintaining racially segregated facilities and failing to provide protection to black persons seeking to use facilities traditionally used by whites."

Then Mr. Kennon refers to Mr. Jones' administration as president of the Chicago Branch that began in late fall 1957. He asserts that the branch's support of the westside unit was withdrawn under Mr. Jones. He avers that:

> Mr. Jones' election, on information and belief, was made possible by an agreement made between himself and William Dawson, under which certain activities of the Chicago Branch N.A.A.C.P. were to be discontinued by Jones and his administration in exchange for which Jones and his administration were to receive the support of Dawson and the Democratic Organization. Mr. Dawson was at that time Ward Committeeman of the Second Ward Regular Democratic Organization, and the publicly acknowledged leader of the third, fourth, and twentieth wards. Mr. Jones named as his administration's Chairman of the Legal Redress Committee of the Chicago Branch, and legal advisor to the president, George Leighton, who, on information and belief, was also connected to the Democratic Organization in that he had been president of the Third Ward Regular Democratic Organization, and continued to be active in the Chicago Democratic Organization.

Mr. Kennon continues with a recital of what happended within the NAACP in Chicago after Mr. Jones' election. He avers that "[t]he process of withdrawal of support by the Jones administration, which included George Leighton as legal counsel, resulted in a number of challenges being made from time to time in N.A.A.C.P. meetings to the legality and propriety of actions taken by the Jones administration. These challenges were often referred to and decided in those meetings by George Leighton, whose opinions consistently favored whatever position had been taken by Mr. Jones." The affidavit continues to recite the disagreements, the philosophical differences that emerged in the administration of the Chicago Branch, NAACP during Mr. Jones' terms as president in 1957 and 1958. Mr. Kennon concludes his affidavit with the assertion that "I, and many others who were active in the Chicago Branch N.A.A.C.P. and its units during 1957-1959, seriously dispute the credibility of Theodore Jones and those in power during his administration as persons seriously concerned with furthering the interests of black people."

Mr. Timuel D. Black states in his affidavit that he had read all Mr. Kennon had said "and would testify to substantially the same effect if I were called as a witness in the case." He then asserts that he also attended the fall 1957 meeting of the Chicago Branch at which Mr. Jones was elected president. He says that precinct workers and captains of Mr. Dawson's political organization were present; these were people who "at that time publicly acknowledged to be under the leadership of William Dawson [sic]." Then he says that:

> I was one of several persons who sought, while Theodore Jones was president and George Leighton was Legal Redress Committee Chairman of the Chicago Branch N.A.A.C.P. to have the organization fulfill one of its tradional roles by moving legally against the city of Chicago and the Chicago Board of Education to remedy discrimination against blacks. In particular, in 1957 and 1958 we sought, in the wake of the decision of the United States Supreme Court in *Brown v. Board of Education*, to have the N.A.A.C.P. Legal Redress Committee seek the cessation of segregation in the Chicago public schools. We were rebuffed by Mr. Leighton and Mr. Jones. I and others also sought in 1957 and 1958 to have the N.A.A.C.P. and the Legal Redress Committee press the city of Chicago legally on the issue of housing segregation. Again, we were refused by Mr. Leighton and Mr. Jones.
>
> The events surrounding the election of Mr. Jones in 1957 and, with respect to matters involving any challenge to city government and/or the Democratic Party, the subsequent inaction of the N.A.A.C.P. and its Legal Redress Committee, were the results of a deal whereby the Chicago Branch N.A.A.C.P. became a captive of the Democratic Party. The actions taken by Theodore Jones and George Leighton during 1957, 1958 and 1959 pitted the leadership of the Organization against its members, and were opposed to the interests of black people and the Organization itself. On the basis of the events known to me, neither of those individuals possesses any credibility as a spokesman for the interests of black people. Mr. Jones' actions as a member of the board of commissioners of the

> Chicago Park District, which I have observed, are consistent with the actions and positions taken by him in 1957-59 in the N.A.A.C.P., where, as with the Park District, he and George Leighton served the interests of the Cook County Democratic Party.

It is readily noticed that neither Ms. Renee Bradford nor anything this court has done or said about her is mentioned in any of these four affidavits. None of these affiants make any direct reference to this suit or its issues. None of these affidavits refer to, allege, describe, or aver any fact which shows that this court has a personal bias or prejudice against Ms. Bradford or in favor of the defendants, or any of them. Apparently, Ms. Bradford, or some lawyer on her behalf, believes that when this case is heard on the merits, the issues will be resolved, and the controversy decided, solely on Mr. Jones' testimony. This will not be so; and certainly, despite what this court has said about Mr. Jones, no reasonable person will take those words to mean that he will be believed without regard to other evidence in the case.

One thing, however, is clear: none of these affiants hold Mr. Jones in high regard. And certainly, two of them, Messrs. Kennon and Black, do not think much of this judge's civil rights contributions to the Negroes of Chicago. But of what relevancy to the issues raised by Ms. Bradford's recusal motion is this review of Mr. Jones' Chicago Branch presidency, and of this judge's record as a civil rights lawyer?

An affidavit filed in support of a motion to recuse a judge under Section 144 is not a mechanism by which his civic accomplishments are appraised either for acclaim or condemnation. It is the means, provided by law, for a showing, with particularity, that the federal judge has a personal bias or prejudice either against the movant or in favor of any adverse party. See *United States v. Taylor*, 569 F.2d 448, 450 (7th Cir. 1978); cf. *International Business Machines Corp.*, 475 F.Supp.

1372, 1379-1381 (S.D. N.Y. 1979); Annot. 23 ALR Fed. 637. These four affidavits do not perform this important statutory function. *United States v. Ming*, 446 F.2d 1000, 1004 (7th Cir. 1972); *Peacock Records, Inc. v. Checker Records, Inc.*, 430 F.2d 85 (7th Cir. 1970). Consequently, even if Ms. Bradford could have incorporated them by reference into what she filed in support of the motion to recuse this court, her affidavit would not have qualified under Section 144, Title 28, United States Code. For these reasons, the court is compelled to conclude that the affidavits filed in support of the motion to disqualify pursuant to 28 U.S.C. § 144 are not legally sufficient.

D

The affidavits with which Ms. Bradford supports her Section 455(a) motion are the same ones she filed in support of the motion under Section 144. Section 455(a) provided that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This statute has been construed by many courts; and it has been the subject of comments by scholars. See, *e.g, Blizard v. Frechette*, 601 F.2d 1217 (1st Cir. 1979); *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977); *United States v. International Business Machines*, 475 F.Supp. 1372 (S.D. N.Y. 1979); Wright, Miller & Cooper, Federal Practice & Procedure, § 3549; Comment, *The Elusive Appearance of Propriety: Judicial Disqualification under Section 455*, 25 DePaul L. Rev. 104 (1975); Comment, *Disqualification of Federal Judges for Bias Under 28 U.S.C. § 144 and Revised § 455*, 45 Fordham L. Rev. 139 (1976); note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. § 455*, 178 U. of Ill. L. F. 863 (1978).

The concern under Section 455(a) is with the appearance of impartiality rather than the fact of bias of prejudice because, as one court has said, "[the] appearance of impartiality is virtually as important as the fact of impartiality." *Bell v.*

Chandler, 569 F.2d 556, 560 (10th Cir. 1978). Accordingly, the test of recusal under this section is whether a reasonable person, knowing all of the circumstances, might reasonably question the judge's impartiality. *Smith v. Pepsico, Inc.*, 434 F.Supp. 424, 425 (S.D. Fla. 1977); Annot. 40 A.L.R. Fed. 954, 959. This being so, a court considering the sufficiency of a recusal affidavit is not limited to the facts which it discloses; all evidence of the alleged bias or prejudice should be considered. *Matter of Searches Conducted on March 5, 1980*, 497 F.Supp. 1283, 1291 (E.D. Wisc. 1980). Both case law and legislative history of Section 455(a) establish that "[t]he basis for a disqualification for lack of impartiality must be reasonable. *S.J. Groves & Sons v. Intern. Bro. of Teamsters*, 581 F.2d 1241, 1248 (7th Cir. 1978); H. Rep. No. 93-1453, 1974 U.S.Code Cong. & Admin. News, pp.6351, 6355. And, as in the case of a Section 144 motion, the determination should be made on the basis of conduct extra-judicial in nature, as distinguished from conduct within a judicial context. *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, 1052 (5th Cir. 1975).

Among the circumstances which are not disclosed in any of the affidavits is the fact that on more than one occasion, in open court, this judge made it clear to the parties that his only reason for wanting to hear from Mr. Theodore Jones was to learn what, as a park district commissioner, he knew of Chicago Park District policies with regard to the factor of race in the application of park resources. This judge emphasized his desire, and the need for evidentiary assistance in resolving the factual and legal issues presented by the motion for preliminary injunction. It is true, as shown by the Dickerson, Rich, Kennon and Black affidavits that this judge knew of, and participated in some of Mr. Jones' civic activities in the Chicago Branch, NAACP; but it was only in the course of these judicial proceedings that this judge had the opportunity to learn what Mr. Jones knew about the principal defendant in this case, the

Chicago Park District. At no time did this judge, as did the district judge in *Roberts v. Bailar*, 625 F.2d 125, 127 (6th Cir. 1980), prejudge the testimony of Mr. Jones.

It is generally said that the bias or prejudice alleged in an affidavit to recuse must have its basis in something other than what the judge learned from his participation in the pending case; and merely showing that he has issued adverse rulings, taken adverse actions, or made unfavorable statements during the course of the litigation, is insufficient *Resident Advisory Board v. Rizzo*, 510 F.Supp. 793, 796 (E.D. Pa. 1981); 48 C.J.S. Judges 143. This being so, it is obvious that there is no appearance of partiality on the part of this judge from the fact, as stated by the four affiants, that more than two decades ago he worked with Mr. Jones in the civil rights activities of the Chicago Branch, NAACP; and that in these proceedings, this judge learned of, and commented upon, Mr. Jones' activities between 1976 and 1979 as a Chicago Park District Commissioner. No reasonable person would think otherwise. Therefore, this court must conclude that these same affidavits are also legally insufficient to support Ms. Bradford's motion to recuse under 28 U.S.C. § 455(a). Accordingly, an appropriate order will be entered denying the motion to transfer these disqualification motions to another judge of this court for hearing, and denying the motions to recuse under 28 U.S.C. § 144 and 455(a).

So ordered.

/s/ GEORGE N. LEIGHTON
George N. Leighton
United States District Judge

Dated: January 7, 1983